

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 79
3028353

BETWEEN	SAM WARD Applicant
AND	CONCRETE STRUCTURES (NZ) LIMITED First Respondent
AND	PERPETUAL GUARDIAN TRUST Second Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Gregory Bennett, Advocate for the Applicant
Kevin Badcock, Counsel for the First Respondent
Fraser Wood, Counsel for the Second Respondent

Investigation Meeting: On the papers

Submissions and further Information Received: 14 February 2019 from the Applicant
14 February 2019 from the First Respondent

Date of Determination: 15 February 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 12 February 2019 I issued a determination in which I found Gregory Bennett had breached s 134A of the Employment Relations Act 2000 by obstructing and delaying the Authority's investigation. I directed him to pay penalties totalling \$8,000. In addition, I found Mr Ward was entitled to a contribution towards his costs and ordered Concrete Structures (NZ) Limited (CSL) to pay him a sum of \$4,000.¹ I shall refer to this determination as the costs and penalty determination.

¹ *Ward v Concrete Structures (NZ) Limited* [2019] NZERA 67.

[2] At 4.17 pm that day Mr Bennett and Mr Ward applied by way of email for an interim non-publication order of the costs and penalty determination pending the outcome of a challenge to the Employment Court. That application is opposed by CSL.

[3] As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The Authority's Procedure

[4] The application for an interim non-publication order was considered on an urgent basis. Both parties were offered and accepted an opportunity to attend a conference by telephone to be heard on it. This telephone conference took place on 14 February 2019 at which time both parties provided oral submissions.

The Law

[5] The Authority may, in any proceedings, make non-publication orders in accordance with Clause 10(1) of Schedule 2 of the Act. The scope of the Court's discretionary powers has been traversed by a full Court in *H v A*² and recently addressed by Judge Inglis in *XYZ v ABC* where she considered and applied the approach taken by the Supreme Court in *Erceg v Erceg*.³

[6] In *XYZ*, Judge Inglis held that the approach advocated by the majority of the Employment Court in *H v A Ltd*; namely that an applicant does not need to make out to a high standard the existence of exceptional circumstances such that a non-publication order is warranted, has been superseded by the recent Supreme Court decision in *Erceg*.

[7] In *Erceg*, the Supreme Court emphasised that the starting point is the principle of open justice, and that a high standard must be met before that principle can appropriately be departed from. While broad discretionary power exists in relation to

² *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [78].

³ *XYZ v ABC* [2017] NZEmpC 40, EMPC 69/2017; *Erceg v Erceg* [2016] NZSC 135.

non-publication orders, that does not mean it is unfettered or can be exercised at the whim of the decision maker.⁴

[8] The Court held that a stringent approach to applications for non-publication orders is required because of the fundamental importance of the principle of open justice. The Court cited the observations of Kirby J in *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131, which was cited with approval by the Supreme Court in *Erceg*;⁵

It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of the courts, or the issue of suppression orders in their various alternative forms: ... A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.

[9] In the particular circumstances of *XYZ*, the Court held the plaintiff had demonstrated the requisite high standard such that the interests of justice required a departure from the usual principle of open justice. There was evidence, including a medical report, of the potential serious impact of publication on the plaintiff's mental state. Publication was also likely to significantly add to the relentless harassment the plaintiff was suffering from her ex-partner. The plaintiff's status as a regulated professional did not of itself operate in favour of non-publication. Her Honour noting that "it seems to me to be wrong as a matter of basic principle and to differentiate between classes of employees based on professional status."⁶

Mr Bennett's submissions

[10] Mr Bennett's email to the Authority sought non-publication on the grounds

Given that there is a reference to my ... who can be identified and that the determination is being appealed tomorrow, I am seeking that the determination is withheld pending the de novo and challenge to the Court. In

⁴ At [65] and [69].

⁵ At [71].

⁶ At [75]. 76 and [79].

addition, a number of people will be able to identify the ... and the person from ... which is unacceptable.

Also arising from the determination is a breach of natural justice. ... in a similar case was late in filing and the member failed to take any affirmative action.

[11] Mr Bennett also raised a new ground during the telephone meeting, namely that of reputational damage. He submitted that the publication of the costs and penalty determination would cause irreparable harm to his reputation.

Ground One: Identification of parties

[12] I am satisfied that a permanent non-publication order regarding the identification of the persons and entities identified at paragraphs [13], [27] and [45] of my costs and penalty determination ought to be made. These persons were incidental third parties that were neither witnesses nor a party to the Authority's investigation.⁷

[13] I order the non-publication of the names of the persons and entities identified at paragraphs [13], [27] and [45] of my costs and penalty determination. I further order the following paragraphs of the determination on costs and penalty to be redacted, as identified in square brackets, as below:

[13] Mr Bennett responded at 12.39 pm to advise that he had read the Authority's minute. He indicated that [redacted as per non-publication order] had been rushed to hospital at 10 am that morning and he would respond when he was able.

[27] In the afternoon of 7 August 2018 Mr Bennett provided Mr Ward's submissions on the preliminary issue. He also provided a redacted "Airpoints Activity Detail" report along with the following comment:

I returned to NZ on late Tuesday night.

As to hearings, I had a mediation in Christchurch on Friday and was also finalising one in respect of [redacted as per non-publication order] that was done privately. On Sunday I had a final meeting prior to submissions to the [redacted as per non-publication order] in respect of a [redacted as per non-publication order], Monday I had a mediation in Manukau.

Further on my return, I had clients that I had to see, in respect of impending disciplinary meetings, and deal with other clients (both employer and employee). I had a disciplinary hearing in Mt Wellington on Thursday afternoon. On Monday morning I had a client to attend to in respect of an Authority matter.

⁷ *H v A Limited*, above n 2, at [76], [78] and [80].

In regards to Saturday, I finalised a costs submissions and finalising an Employment Court matter against the ERA for a client, that also covered Sunday morning.

[45] For completeness, I also considered whether [redacted as per non-publication order] admission to hospital on 3 July 2018 was sufficient cause for his obstruction. I have no information as to whether or not this had any real effect on his ability to meet the timetable set by the Authority. It is more likely than not that it did not. By the time [redacted as per non-publication order] was admitted to hospital Mr Bennett had filed a witness statement for Mr Ward, had filed the common bundle, and had advised that he did not intend to file witness statements from the other two witnesses.

Ground Two: Breach of Natural Justice

[14] There were two grounds advanced by Mr Bennett in his oral submissions relating to his allegation of breach of natural justice. The first was that the Authority had breached the Bill of Rights Act by not providing him with an opportunity to respond to the issue of his computer issue. The second was that the Authority had not treated him in the same manner as another representative on another case before the Authority.

[15] The Court hearing a challenge will determine the merits of Mr Bennett's arguments on these matters. However, as these matters were raised as grounds for the interim non-publication order, I will address them.

[16] Firstly, in terms of the breach of the Bill of Rights Act, it is quite wrong of Mr Bennett to say that a penalty was imposed on him without affording him with an opportunity to respond to the allegation that he had the ability to print and scan by the afternoon of 30 June 2018. The reference to the NZ Bill of Rights Act provision regarding natural justice is redundant. The Employment Relations Act expressly and directly requires the Authority to comply with the principles of natural justice in carrying out its role: s 157(2)(a).

[17] As recorded in the determination, on 5 July 2018 CSL filed a lengthy memorandum that questioned the veracity of Mr Bennett's explanation. It referred to an email that Mr Bennett sent to the Authority at 3.26 pm on 30 June 2018. That email attached a PDF document that Mr Bennett asked the Authority to consider. This pdf showed that the first two pages were printed on 30 June 2018. This suggested that Mr Bennett had the ability to print and scan by the afternoon of 30 June

2018. CSL submitted that Mr Bennett and Mr Ward were obstructing the Authority's investigation without sufficient cause and failing to comply with directions. A request was made for the Authority to determine whether a penalty should be imposed.

[18] If the allegation made by CSL was incorrect Mr Bennett could have responded to CSL's memorandum. He could also have addressed this issue in the submissions he filed on penalty. He did not do either. This is despite the Authority issuing a minute following receipt of CSL's memorandum which, inter alia, addressed CSL's request for the Authority to consider a penalty and reiterated that I intended to address this issue after I had dealt with the substantive matter.

[19] Secondly, in terms of the treatment of another representative on another case, this was a matter that Mr Bennett raised during the investigation process and was addressed in my minute of 6 July 2018. At that time I recorded that Mr Bennett considered there was "a disparity of treatment in the way the Authority is treating him as opposed to other Advocates/Counsel on other files before the Authority." His complaint was unfounded. The circumstances of the case he referred were quite different to the present. My response to his complaint is set out at paragraph 20 of the costs and penalty determination.

Ground Three: Reputational damage

[20] For the reasons that follow I am not satisfied that Mr Bennett has discharged the high onus of proof placed on him such that the interests of justice require a departure from the usual principle of open justice.

[21] Firstly, the public has a legitimate interest in knowing the identity of the parties especially in the present circumstances where Mr Bennett trades as an "employment law specialist".

[22] Secondly, Mr Bennett has been subject to criticism by the Authority for the delays and obstructions he has caused in a number of investigations in recent years.⁸ Each of these cases are matters of public record including the determination of *Davidson v Great Barrier Airlines Ltd* where Mr Bennett was ordered to pay penalties

⁸ *Taiapa v Te Runanga O Turanganui A Kiwa t/a Turanga Ararau Private Training Establishment* [2012] NZERA Auckland 289 at [10]; *McCormick v Compass Communications Limited* [2015] NZERA Auckland 293 at [16]; *Moskal & Anor v Manor House Cuisine (2015) Limited* [2017] NZERA Auckland 236.

by the Authority.⁹ Mr Bennett was unable to point to any evidence of damage to him as a result of the public becoming aware of his conduct in those cases.

[23] Thirdly, the determination is already in the public forum. CSL informs me that prior to receiving Mr Bennett's application it had already released the determination to CSL who had in turn distributed it to parties involved in the investigation. In addition, the NZ Herald published an article on the substantive determination on 1 December 2018 in which Mr Bennett is reported as having made comment. That determination recorded:¹⁰

[117] During the course of this investigation there were multiple breaches of the timetable directions by Mr Ward and his representative, Mr Bennett. These breaches obstructed and delayed my investigation.

[118] By Minutes dated 6 July 2018 and 12 July 2018 I indicated that the Authority would consider a penalty against Mr Ward and/or Mr Bennett. I advised that I intended to address this issue after I had dealt with the substantive matter and following receipt of submissions from the parties.

Finding

[24] After considering the parties' oral submissions, and balancing the respective considerations identified by each of the parties, I am satisfied that the requisite high standard has not been reached so as to grant a non-publication order. The public has a legitimate interest in knowing the identity of the parties.

[25] I decline Mr Bennett's application for an interim non-publication order pending the outcome of his challenge to the Court. However, in light of Mr Bennett's indication that he intends to challenge this determination on non-publication, and following the recommendation of the Court in *Y v D*, I grant an interim non-publication order for a period of 7 days from today.¹¹

Outcome

[26] The overall outcome is:

- a. The Application for an urgent interim order prohibiting publication of the Authority's determination on costs and penalty, *Ward v Concrete*

⁹ [2016] NZERA Auckland at [26].

¹⁰ At [117]-[118].

¹¹ *Y v D* [2003] 1 ERNZ 623.

Structures (NZ) Limited [2019] NZERA 67 issued to the parties on 12 February 2019, is declined.

- b. In order to preserve the status quo in the event that this determination is challenged to the Employment Court, I grant an interim non-publication order for a period of 7 days from the date of this determination.
- c. I order the non-publication of the names of the persons and entities identified at paragraphs [13], [27] and [45] of my costs and penalty determination.
- d. I order the following paragraphs of the costs and penalty determination to be redacted, as identified in square brackets, as below:

[13] Mr Bennett responded at 12.39 pm to advise that he had read the Authority's minute. He indicated that [redacted as per non-publication order] his daughter had been rushed to hospital at 10 am that morning and he would respond when he was able.

[27] In the afternoon of 7 August 2018 Mr Bennett provided Mr Ward's submissions on the preliminary issue. He also provided a redacted "Airpoints Activity Detail" report along with the following comment:

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As to hearings, I had a mediation in Christchurch on Friday and was also finalising one in respect of [redacted as per non-publication order] that was done privately. On Sunday I had a final meeting prior to submissions to the [redacted as per non-publication order] in respect of a [redacted as per non-publication order], Monday I had a mediation in Manukau.

Further on my return, I had clients that I had to see, in respect of impending disciplinary meetings, and deal with other clients (both employer and employee). I had a disciplinary hearing in Mt Wellington on Thursday afternoon. On Monday morning I had a client to attend to in respect of an Authority matter.

In regards to Saturday, I finalised a costs submissions and finalising an Employment Court matter against the ERA for a client, that also covered Sunday morning.

[45] For completeness, I also considered whether [redacted as per non-publication order] admission to hospital on 3 July 2018 was sufficient cause for his obstruction. I have no information as to whether or not this had any real effect on his ability to meet the timetable set by the Authority. It is more likely than not that it did not. By the time [redacted as per non-publication order] was admitted to hospital Mr Bennett had filed a witness statement for Mr Ward, had filed the common bundle, and had advised that he

did not intend to file witness statements from the other two witnesses.

- e. A revised version of the determination, incorporating the redactions ordered, will be prepared and loaded to the Employment Law Database after the expiry of the seven day interim non-publication period unless, meanwhile, Mr Bennett has filed a challenge and an order or direction of the Court requires the interim non-publication to continue for any required period. Until then the determination as originally issued will not be published on the Employment Law Database.¹²

Jenni-Maree Trotman
Member of the Employment Relations Authority

¹² <https://www.employment.govt.nz/elaw-search>.