



temporarily maintained the previously made non-publication order and a further order prohibiting the Court file from being accessed without the leave of a Judge first being obtained.

[3] Subsequently, counsel confirmed that the parties did not seek a permanent non-publication order. The applicant, however, sought to maintain the order that the Court file not be searched without leave.

[4] Ms Martin acknowledged that the order sought reflects the position which applies to any application by a non-party. She accepted that in dealing with such applications the Court applies by analogy the Senior Courts (Access to Court Documents) Rules 2017. However, the applicant is seeking comfort about the future protection of confidential and commercially sensitive information it relied on to support the applications.

[5] The application is not opposed by the respondent.

### **Analysis**

[6] There are no provisions in the Employment Relations Act 2000 (the Act), or the Employment Court Regulations 2000, dealing with access to documents on the Court's file.

[7] The usual course taken in those circumstances is that reg 6 is applied, so that the Court can dispose of a case as nearly as may be practicable in accordance with the High Court Rules 2016 affecting any similar case.<sup>3</sup> The regulations provide that if there are no provisions in the High Court Rules that can be adopted, the case is to be disposed of in such manner as the Court considers will best promote the object of the Act and "the ends of justice".<sup>4</sup>

[8] The High Court Rules no longer provide for access to Court files. Previously those rules dealt with access in sub-pt 2 of pt 3, but it was revoked and replaced by the Senior Courts (Access to Court Documents) Rules 2017. The Employment Court is

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<sup>3</sup> Employment Court Regulations 2000, reg 6(2)(a)(ii).

<sup>4</sup> Regulation 6(2)(b).

not a Senior Court listed in those rules and, unfortunately, no corresponding amendment was made to the Act or regulations to address the gap created by the repeal and replacement of the sub-pt.

[9] The Court has filled the resulting gap by applying reg 6(2)(b) and adapting the Senior Courts (Access to Court Documents) Rules by analogy.

[10] Ms Martin accepted that those rules would be applied if an application was made and that Downer would be given an opportunity to respond. While she referred to the analysis of this approach in *Pilgrim v Attorney General*, it was first used in *Prasad v LSG Sky Chefs New Zealand Ltd*.<sup>5</sup>

[11] The rules distinguish between access by a party to the litigation and by a non-party on request.<sup>6</sup> Under those rules, access to the formal Court record is available to every person. That record comprises:<sup>7</sup>

- (a) a register or an index:
- (b) a published list that gives notice of a hearing:
- (c) a document that—
  - (i) may be accessed under an enactment other than these rules; or
  - (ii) constitutes notice of its contents to the public:
- (d) a judgment, an order, or a minute of the court, including any record of the reasons given by a Judge:
- (e) the permanent court record under Part 7 of the Criminal Procedure Rules 2012:
- (f) the rolls of barristers and solicitors kept under section 56 of the Lawyers and Conveyancers Act 2006 or any former corresponding enactment

[12] The confidential and commercially sensitive material to which the present application is directed is not in the formal Court record, because it was supplied in the supporting evidence relied on for the freezing and ancillary orders. Access to that information by a non-party is possible, but only if the Court grants it after considering

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<sup>5</sup> *Pilgrim v Attorney General (No 33)* [2023] NZEmpC 84 at [5]; *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 160; see also *Sawyer v The Vice-Chancellor of Victoria University of Wellington* [2019] NZEmpC 7 at [8]; and *Johnston v The Fletcher Construction Co Ltd* [2020] NZEmpC 117.

<sup>6</sup> Senior Courts (Access to Court Documents) Rules 2017, rr 6(b) and 7.

<sup>7</sup> Rule 4.

rr 11, 12 and 13. If granted that access can be subject to any conditions the Court considers appropriate to impose.

[13] Rule 11 requires a non-party seeking access to provide information to support the request. Importantly for present purposes, r 11(2)(c) requires reasons to be given for seeking access including the purpose for which it is sought.

[14] Rule 11(2)(d) also requires a non-party seeking access to a specific document or documents to set out any conditions that might be proposed if access is granted.<sup>8</sup>

[15] Rule 12 lists eight matters to be considered in deciding whether to grant or refuse an application for access to the balance of the Court file by a non-party. Among those matters relevant to this application are considerations of:<sup>9</sup>

- (a) the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals or matters that are commercially sensitive than is necessary to satisfy the principle of open justice;
- (b) the protection of other confidentiality and privacy rights and any privilege held by, or available to, any person;
- (c) the principle of open justice, including the encouragement of fair and accurate reporting of and comment on Court hearings and decisions; and
- (d) any other matter that the Court considers appropriate.

[16] Rule 13 states what a Judge must have regard to in considering the matters listed in r 12. Those considerations differentiate between disclosure during the substantive hearing and what might happen before or after it. Before the hearing access to documents may be limited. That assessment shifts during the hearing so that

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<sup>8</sup> Rule 11(7)(a).

<sup>9</sup> Rules 12(c), 12(d), 12(e) and 12(h) respectively.

open justice has greater weight than at other stages of the proceeding and that includes in relation to documents relied on. The assessment shifts again after the substantive hearing. The principle of open justice continues to apply and has greater weight in relation to documents that were relied on in the hearing but the assessment requires the protection of confidentiality and privacy interests to have greater weight than would be the case during the substantive hearing.

[17] In summary, therefore, any non-party seeking access to documents filed by Downer that it wishes to now protect needs to apply with supporting information and to have the application assessed under rr 12 and 13 which will include considering its confidential and commercially sensitive nature.

[18] Ms Martin's memorandum acknowledged the need for a non-party to apply and that there would be an opportunity for the parties to respond. The memorandum did not, however, pay close attention to the assessment factors in rr 12 and 13.

[19] Stripped down to its essential elements the application really does little more than say that Downer seeks an order to make sure that if in future a non-party seeks access to the file the Court will, in considering it, comply with the rules.

[20] There is no need for an order that would not do anything more than state the Court's intention to comply with a process it has previously, and repeatedly, held to apply in these situations. The assessment criteria are more than sufficient to enable the protection of confidential and commercially sensitive information if that is necessary. Downer's application is unsuccessful and it is dismissed.

[21] The non-publication order and order prohibiting the Court file from being searched made on 2 August 2023 and subsequently renewed are now set aside.

[22] There is no order for costs.

K G Smith  
Judge

Judgment signed at 4.45 pm on 20 November 2023