Employment Court of New Zealand

AJH v Fonterra Co-Operative Group Limited [2021] NZEmpC 111 (21 July 2021)

Last Updated: 27 July 2021

ORDER PROHIBITING PUBLICATION OF NAME AND IDENTIFYING DETAILS IN THE CONTEXT OF THIS JUDGMENT

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2021] NZEmpC 111
EMPC 202/2021

IN THE MATTER OF	an application for non-publication order
BETWEEN	AJH Applicant
AND	FONTERRA CO-OPERATIVE GROUP LIMITED Respondent

Hearing:	On the papers
Appearances:	Applicant in person M McFadden, counsel for respondent
Judgment:	21 July 2021

JUDGMENT OF JUDGE J C HOLDEN

(Application for non-publication order)

[1] The applicant (AJH) worked for the respondent, Fonterra Co-operative Group Ltd (Fonterra), for a relatively short period before they were dismissed.

[2] AJH brought proceedings in the Employment Relations Authority (the Authority) that ultimately were unsuccessful. They challenged the Authority's determination but were unsuccessful.

[3] Now, almost 10 years later, the applicant applies to the Court to have their name "removed from the internet" and suppressed.

[4] They say that having their name on the internet is causing them to have difficulty in gaining employment as many employers do a "media search" these days and would see that they have taken a previous employer to court. AJH says they know employers will not hire a person who has taken a company to Court. AJH says they have applied for a job recently and have been told the employer is going to do a "social media check".1

[5] AJH notes that their name is now different from when they took their proceedings but says having their previous name available in internet searches still causes them problems as all their references and other documents are in their previous name.

[6] Fonterra neither opposes nor supports the application. It says that it considers this to be a matter for resolution between the applicant and the Court.

[7] The applicant was invited to file submissions in support of their application. Initially, they advised that, because Fonterra did not raise any issue with the application, they had no submissions to make. The Court registry advised AJH that the Court would still need to fully consider the application, notwithstanding Fonterra's position. AJH was again invited to make submissions. They responded noting Fonterra's lack of objection and saying they did not have anything more to add except that, over the years, it has been very damaging to have their name on "social media" and that getting new employment has been difficult because employers "do social media checks". They also refer to a Family Court matter in which their case with Fonterra was apparently raised.

[8] It is unclear if AJH's application extends to the Authority determinations. The application mentions not wanting prospective employers to know they had taken a former employer "to court", but one assumes the same issues apply to the Authority determinations.

1. I have understood the applicant's use of the phrases "media search" and "social media check" to include, more broadly, the use of a search engine such as Google.

[9] AJH's application focusses on their claims against Fonterra but they also appear to have taken other unrelated (and mostly successful) proceedings against other employers.

The application faces an insurmountable hurdle

[10] AJH's main issue appears to be with the readiness with which the judgments in their cases are available upon a Google search. They are, however, published not only on the Employment Court's website but also on legal databases such as Westlaw, Lexis Advance and New Zealand Legal Information Institute (NZLII). These cases bearing AJH's name have since been cited in employment law textbooks and other Court judgments.

[11] As noted in *Crimson Consulting Ltd v Berry* an applicant is not required to establish exceptional circumstances to obtain an order for non-publication, but the standard for departing from the fundamental rule that justice should be administered openly is high. The party seeking non-publication must show specific adverse consequences that would justify a departure from the fundamental rule.2

[12] The Court has become increasing aware of claims of significant detrimental impact caused to people's employment prospects by the publication of those people's names. It has noted that it does not sit comfortably within the legislative framework that parties that come to the Court might attract publicity that has a likelihood of inflicting further damage on their current employment relationship or their chances of finding future employment.3 While the focus has been on employees, presumably similar concerns may exist for some small and medium employers.

[13] However, the first, and insurmountable hurdle to AJH's application is the time that has elapsed since the decisions in question and the extent to which the judgments have now been reported. As noted in *Crimson Consulting*: "It is well established that a Court should not make an order of non-publication if it would be futile to do so."4

2 *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511 at [95]–[97].

3. See *JGD v MBC Ltd* [2020] NZEmpC 193, [2020] ERNZ 447; and *FVB v XEY* [2020] NZEmpC 182, [2020] ERNZ 441 at [11].

4 *Crimson Consulting*, above n 2, at [105].

[14] Two cases are referred to. The first was *Timmins v Asurequality Ltd* where an "extraordinary delay" of approximately five years separated the substantive judgment and the application for non-publication. Chief Judge Colgan agreed that, where matters had been in the public domain for a number of years, the futility of a non- publication order militated strongly against such an order.5

[15] Similarly, in *Q v W* Judge Travis noted that Authority determinations and District Court decisions had been in the public arena for a number of years and that it would have been futile for the Court to continue an interim suppression order in those circumstances.6

[16] Both cases quote a High Court decision, *Zanzoul v Removal Review Authority*, which stated:7

In the course of his argument, Mr Ellis made an oral application for suppression in these present proceedings of Mr Zanzoul's name, and any details leading to his identity. The Supreme Court has previously declined such an application, essentially on the well-settled basis that the Court will not order suppression where it would be futile because the matter is already in the public arena.

[17] Given the delay of around 10 years and the widespread publication of cases in which AJH is named, their application is similarly futile.

[18] AJH's application fails.

Insufficient evidence of specific adverse consequences

[19] Another difficulty for AJH is that the evidence they provide is vague and speculative. There is no clear line drawn between the assumed internet searches and any failure to obtain new employment. Although, in cases like this, some inferences may be required, the Court would need more than the applicant has provided to be satisfied a non-publication order was justified.

5. *Timmins v Asurequality Ltd (formerly known as Asure New Zealand Ltd)* [2011] NZEmpC 167 at [23].

6 *Q v W* [2012] NZEmpC 216 at [31]- [33].

7 *Zanzoul v Removal Review Authority* HC Wellington CIV-2007-485-1333, 9 June 2009 at [106].

There are also potential jurisdictional issues

[20] Given the merits of the application, it is unnecessary to determine the jurisdictional issues around the Authority's determinations (if in fact they are included in the application). However, there is a real issue as to whether I could make non- publication orders in respect of AJH's name in those determinations.

[21] In *P v A (No 3)* Judge Perkins granted permanent non-publication orders over the Authority determinations as a record of settlement had been entered into where the parties (prior to gaining approval of the Court) agreed that non-publication would be agreed to in exchange for the plaintiff discontinuing their claims. In those circumstances, the interests of justice were found to merit non-publication.8

[22] In *Chief Executive of the Department of Corrections v Tawhiwhirangi* Judge Shaw held that such an order was appropriate to preserve the privacy of a non-party prisoner and therefore made an order prohibiting the publication of the names or any other identifying details of any prisoner named in the case, including in the determination of the Authority.9 The judgment was brief and the substantive merits probably seemed straightforward in the circumstances.

[23] Notwithstanding these decisions, I have doubts about whether the Court has jurisdiction to order non-publication of the details of an Authority determination without the matter first having been considered by the Authority. A definitive answer, however, is best left to a case where the issue is fully argued.

Non-publication orders made in respect of this judgment

[24] Although not explicit in AJH's application, I have assumed they seek non- publication orders in respect of this judgment. I consider the public interest in publication of their name in this judgment is minimal noting that, although the application was unsuccessful, there is no adverse finding about AJH.

8 *P v A (No 3)* [2018] NZEmpC 99.

9. *Chief Executive of the Department of Corrections v Tawhiwhirangi* EmpC Wellington WC 14/07, 10 May 2007 at [4].

[25] I consider a non-publication order is appropriate and in the interests of justice. Accordingly, there is an order preventing the publication of the applicant's name in the context of this judgment and the application that led to it, or any details that may identify them.

[26] There is no issue as to costs.

Judgment signed at 9.30 am on 21 July 2021

J C Holden Judge