Employment Court of New Zealand

Bracewell v Richmond Services Limited [2015] NZEmpC 59 (7 May 2015)

Last Updated: 13 May 2015

IN THE EMPLOYMENT COURT AUCKLAND

[2015] NZEmpC 59

ARC 91/13

EMPC 22/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for a rehearing
AND IN THE MATTER	of an application for stay of execution
BETWEEN	JAN SUSAN BRACEWELL Plaintiff
AND	RICHMOND SERVICES LIMITED Defendant

Hearing:	(on the papers dated 23 December 2014, 17 and 27 January, 18, 16 and 20 February, 2, 3 and 10 March, 10, 13, 20 and 24 April 2015)
Appearances:	Dr J Cook, agent for the plaintiff P Shaw, counsel for the defendant
Judgment:	7 May 2015

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Background

[1] This judgment deals with three applications made for Ms Bracewell in the context of an application she has made for a rehearing.

[2] The background, briefly, is that in a substantive judgment of 1 July 20141 I

dismissed Ms Bracewell's challenge to a determination of the Employment Relations

1 *Bracewell v Richmond Services Ltd* [2014] NZEmpC 111.

Authority (the Authority);2 granted an injunction for the return of confidential information; and ordered Ms Bracewell and any agent of hers not to directly or indirectly use or disclose any confidential information of Richmond Services Limited (Richmond), including any information relating to Client A; a penalty of

$2,000 was imposed on Ms Bracewell for breach of the employment agreement. The

Court of Appeal subsequently declined leave to appeal on any question of law.3

[3] On 27 January 2015, Ms Bracewell applied for a rehearing on seven grounds, asserting in summary that her natural justice rights were breached and that a miscarriage of justice had occurred.

[4] The three applications which have been made by Ms Bracewell are as follows

– in the order in which they will be dealt with in this judgment:

a) Application for an order of enforcement directing that the Bay of Plenty District Health Board (Bay of Plenty DHB) provide the Court with certain documents relating to Client A's mental health status.

b) Application for leave to permit Ms Bracewell to examine confidential documents of Client A which are held by the Registrar.

c) Application for continuation of a stay of execution of orders as made previously.

Application in respect of information held by Bay of Plenty DHB

[5] Before outlining Ms Bracewell's application for information from the Bay of Plenty DHB, it is necessary to describe the relevant procedural history. Following the substantive hearing I issued a minute on 28 May 2014. In that minute I indicated that following discussion with the parties at the substantive hearing a direction would be made regarding the provision of evidence as to the status of Client A under the Mental Health (Compulsory Treatment and Assessment) Act 1992 (Mental Health Act) for the period October 2012 to March 2013. The representative for the

Bay of Plenty DHB stated that although it had no obligation to release this

2 *Richmond Services Ltd v Bracewell* [2013] NZERA Auckland 481.

3 *Bracewell v Richmond Services Ltd* [2014] NZCA 629.

information, it would do so since it was necessary to protect Client A from further abuse of her privacy. This step would be taken pursuant to r 11(2)(h)(i) of the Health Information Privacy Code 1994. As a result, I directed the Bay of Plenty DHB to file an affidavit from a person who had knowledge of Client A's clinical records which would annex the documentation that confirmed the legal provisions relating to Client A's mental health status. The parties were given an opportunity to respond to this information.

[6] On 10 June 2014, Ms Bingham, as General Manager of Governance and Quality of the Bay of Plenty DHB provided an affidavit under delegated authority given on behalf of the Board. She had also been a witness at the trial. She produced, under oath, documents relating to Client A's status from the Tauranga District Court dated 22 March 2010 and from the Family Court, Hamilton, dated

21 September 2010 and 22 March 2011. She also produced a document prepared by a responsible clinician, Dr L, which was described as "Notice to Patient Subject to a Compulsory Treatment Order Directing Change from Inpatient to Community Treatment Status". The form stated that a copy had been sent to the Director of Area Mental Health Services.

[7] On 16 June 2014, Ms Bracewell filed a memorandum in which she stated that the Family Court documents provided by Ms Bingham were legitimate, but the review signed by Dr L was a "fake". It was asserted that it "could have been, and has been concocted at any time prior to its submission to the Court, in order to cover the defendant/DHB's lies and thus further mislead the Court." The memorandum went on to make further assertions in support of this conclusion.

[8] I considered the evidence which had been submitted in my substantive judgment,4 stating inter alia that there was no evidence to support the contention that the clinical review had been falsified or that the DHB had "lied" in claiming that Client A's status fell under s 29 of the Mental Health Act. The conclusion reached by the Court is one of the matters which are the subject of Ms Bracewell's application

for rehearing.

4 *Bracewell v Richmond Services Ltd*, above n 1 at [36].

[9] In her interlocutory application Ms Bracewell requests the Court to direct the Bay of Plenty DHB again to provide the Court with Family Court documentation as to Client A's mental health status for the period October 2012 to April 2013. She also requests that the Bay of Plenty DHB be required to produce evidence showing that the s 76 review document prepared by Dr L was sent to the persons who were supposed to receive a copy of that document as specified in s 76(7) of the Mental Health Act. She states that she has good reason to believe that the Family Court documents and related evidence will establish that the s 76 document has been falsified and is incorrect, "thereby supporting her fundamental claim that Richmond/DHB breached her rights under the PD Act and have acted unlawfully to obstruct and pervert the course of justice".

[10] These allegations, along with others, are amplified in an affidavit which Ms Bracewell has now filed in support of her application for rehearing where she invites the Court to conclude the s 76 document has been falsified. I make no comment on the contentions in that affidavit as Richmond has not yet taken the opportunity to file evidence in reply and both parties have yet to file their submissions.

[11] At the Court's direction a copy of Ms Bracewell's application was served on the Bay of Plenty DHB who filed a memorandum in response stating that because it is not a party to the proceedings it is not required to produce evidence to support, or otherwise address any matter that the plaintiff may wish to put before the Court. It also asserted that the accusations of obstructing and perverting the course of justice are serious allegations that cannot be addressed in an employment proceeding to which the Bay of Plenty DHB is not a party.

[12] Richmond has also filed a memorandum in response stating that there is no evidence to support Ms Bracewell's contention; and that in the absence of fresh evidence it is not open to the Court to revisit its original direction as to the provision of information by the Bay of Plenty DHB, or to require further verification of that evidence.

[13] The first part of Ms Bracewell's application is in effect an application for a

compliance order in respect of the Court's original direction. The Bay of Plenty

DHB agreed to provide assistance to the Court for the reasons it gave. The Court formalised the Bay of Plenty DHB's offer by making a direction. An affidavit was filed and served which provided evidence which the Bay of Plenty DHB had agreed to submit. In those circumstances there is no basis for concluding that the circumstances justify the making of a compliance order. Under s 139 of the Employment Relations Act 2000 (the Act) the Court may make such an order only if a person has not observed or complied with inter alia any order.

[14] The second part of Ms Bracewell's application requests evidence showing whether the s 76 review was sent to certain persons. That is in effect a request for third party discovery. Clause 13 of Sch 3 of the Act provides for such a possibility by reference to s 56B of the District Courts Act 1947. That section provides jurisdiction to make an order that a third party disclose whether a document or class of documents which may have been in the possession, custody or power of a person who is not a party to the proceeding, be disclosed. The authorities make it clear that a decision to order such discovery involves the exercise of a discretion, that the documents are relevant in a legal sense, and the Court must be satisfied that it is

necessary to do so.5

[15] Section 76(7) of the Mental Health Act simply requires the sending of a copy of a certificate of clinical review to certain persons. I have no evidence that there is any independent documentation relating to this obligation held by the Bay of Plenty DHB, other than the certificate of review itself – which as already mentioned confirms it was sent to the Director of Area Mental Health Services.

[16] Moreover, on an application for rehearing, the fact that a review document may or may not have been sent to a third party will be of peripheral, if any, relevance to the proposition advanced by Ms Bracewell that it was fabricated; and even more peripheral to the issues that were at the centre of the challenge which relate to whether the disclosures made by Ms Bracewell were protected by the Protected Disclosures Act 2000 (PD Act) or permitted by the relevant employment agreement, since they were not authorised by Client A.

[17] In all those circumstances I am not persuaded that third party discovery should be ordered at this stage in support of an application for rehearing.

[18] The application for orders in respect of the Bay of Plenty DHB is accordingly dismissed.

Application for leave to examine confidential documents held by the

Registrar

[19] Ms Bracewell sought leave of the Court to examine confidential documents of Client A which are held by the Registrar.

[20] Ms Bracewell was previously granted leave to do so,6 and this occurred on

17 March 2014. The documents were previously in Ms Bracewell's possession before they were transferred to the custody of the Registrar. It is asserted, however, that Richmond has now presented "new, previously concealed evidence at the substantive hearing", and that the provision of the s 76 review document has led to "the discovery of new evidence previously unseen by either the applicant, respondent or the Bay of Plenty DHB, which will prove that Ms Bracewell's rights under the [PD Act] were violated". Leave is sought to enable a re-examination of the documents held by the Registrar because "the applicant feels it necessary to re-examine the documents held by the Court to clarify points and uncover evidence that we did not see and could not have seen as relevant until now (e.g. the number, type and date of documents that state Client A to be [section] 30)".

[21] Richmond opposes the request. It is submitted that the documents contain private and sensitive medical information about Client A, that a full hearing of the Court has already determined the documents should be returned to the defendant, and that the plaintiff has no right to continued access to these documents.

[22] It is further submitted that the Court of Appeal has denied leave to appeal the Court's findings and that in those circumstances there must be very compelling reason for the Court to now allow access to those documents.

[23] Next, it is contended that whether or not the documents refer to orders made under s 29 or s 30 of the Mental Health Act is irrelevant. Richmond submits that the disclosures for which Ms Bracewell was found to be in serious breach of her obligations were disclosures to the client's family and to the media; it is asserted this was a breach whether or not there was some other Mental Health Act order in place. Consequently, viewing the documents would not assist the plaintiff's case in any way.

[24] Finally, it is submitted that the plaintiff's chances of succeeding in her application for a rehearing are slim, and that in the circumstances the Court should be very reluctant to allow any access which would essentially constitute a further breach of Client A's privacy.

[25] In my substantive judgment I made it clear that the issues arising in the proceeding could be resolved without the Court having to

examine confidential documents. I concluded that this was not a case where it was necessary for that further information to be admitted in evidence so as to properly resolve the issues

before the Court.7 The Court of Appeal confirmed this point in its decision when it

stated:8

In the end, the Employment Court's decision turned on a determination that the disclosures of confidential information to members of Client A's family and to a journalist could not amount to a protected disclosure to an appropriate authority under the PD Act or the PD Policy. The precise nature of the confidential information disclosed is not material to that decision.

[26] I accept the submission made for Richmond that there would need to be a most compelling reason for the Court to now allow access to these private and sensitive documents. I am also concerned that were access to be provided again, this would be for the purpose of placing information derived from those documents before the Court. To introduce in evidence new information from the confidential documents would amount to an undermining of the ruling already made by the Court in the exercise of a discretion which the Court of Appeal held involved no error of law; and that the matter was not material to the outcome of the case.

[27] The plaintiff's application is accordingly declined.

Application for continuation of stay of execution

[28] Ms Bracewell also seeks a continuation of a stay of execution of some orders originally made in my substantive judgment of 1 July 2014.9

[29] The history of this issue can be briefly described as follows:

a) Following the issuing of the substantive judgment, an application for stay of orders pending appeal was made. I granted that application in my judgment of 17 September 2014.10 In summary, the orders I stayed were:

- The order that the Registrar return a sealed envelope of documents to Richmond.

• The order that Ms Bracewell pay Richmond's costs in respect of

the proceeding before the Authority in the sum of $3,450.

- The order that Ms Bracewell pay Richmond's costs in respect of the Court's proceedings in the sum of $12,906.

• The order that Ms Bracewell pay Richmond's costs in the sum of

$862.50.

b) On 23 December Richmond sought an order from the Court discharging the orders of stay which had been made, given the dismissal of Ms Bracewell's application for leave to appeal on 19 December 2014. Chief Judge Colgan issued a minute on that day providing an opportunity for Ms Bracewell to respond to Richmond's application.

c) Dr Cook did so by memorandum of 17 January 2015, indicating that an application for rehearing was being prepared; she accordingly sought a continuation of the application for stay.

d) On 27 January 2015, an application for rehearing was filed alleging in summary that the Court had erred in certain factual findings, that the Court had incorrectly applied certain provisions of the Evidence Act

2006, and that new evidence was now available. It is also asserted that the Court had left unaddressed and unresolved a point of law which required resolution namely, whether the person who is the subject of the judgment was a vulnerable adult under the Crimes Act 1961. A notice of opposition to this application was filed by Richmond on

16 February 2015.

e) On 5 February 2015, I timetabled Ms Bracewell's new application for stay. I also extended the existing orders of stay, pending resolution of Ms Bracewell's application. These directions resulted in a notice of opposition to the application for stay being filed by Richmond on

18 February 2015, and submissions being filed on the matter by the parties. A ruling was deferred until Ms Bracewell filed her evidence – which occurred on 24 April 2015.

Submissions

[30] Ms Bracewell submitted:

a) Her applications for rehearing and stay were acknowledged to have been filed after the time stipulated in the Employment Court Regulations 2000 (the Regulations); that is 28 days after the decision. Ms Bracewell said this was because she was awaiting a decision

on her application for leave to appeal from the Court of Appeal, and because she alleges the new evidence on which she was relying had only come to light as a result of disclosure made by the defendant at the substantive hearing. Thus, she says she could not have applied for a rehearing sooner.

b) Ms Bracewell submits that her application has merit because it raises breaches of employment law, principles of good faith, and of "lawful/ethical practice".

c) No investigative body had yet considered the evidence which the Court was holding on a protected basis. The Court holds the only copy of these documents, beyond Richmond and the Bay of Plenty DHB.

d) The new evidence would show that Richmond and the Bay of Plenty DHB had exposed Client A to severe and obvious mental and physical harm from which she could not remove herself. She was therefore by definition a "vulnerable adult".

e) It was asserted that if the documents held by the Court were released to Richmond they would "either be altered, destroyed or made inaccessible to investigators".

f) Because it was asserted the new evidence would confirm that Ms Bracewell's rights had been violated under the PD Act so as to prevent investigation of her complaints, she was lawfully entitled to obtain those documents.

[31] For Richmond it was submitted:

a) The company was entitled to the benefit of the orders which it had successfully obtained, now that the application for leave to appeal had been dismissed.

b) More than $17,000 was now owed by Ms Bracewell to Richmond.

c) The highly confidential and sensitive information of Client A was held by a third party without her consent despite the Court making an order to return the information to Richmond.

d) The application for stay was made on the basis that Richmond is entitled to the fruits of its judgment and to protect the rights of its client.

e) It was submitted there was no evidence which would justify the exercise of the Court's discretion to grant a stay. A spurious claim was made that the stay should be granted because Richmond would alter and/or destroy the documents. The Court had ruled that it did not need to see the documents to be able to consider the merits of the plaintiff's case and that relevant authorities, including the New Zealand Police, had already seen them. There was no risk that the defendant would destroy any of the documents; given the history, it would be easy to identify what the documents were, should they ever be required subsequently.

f) Richmond submits that the application for a rehearing is lacking in merit. It was filed significantly out of time. The application was made only because the application for leave to appeal had been dismissed; it was also to be noted that the "new evidence" was in fact evidence referred to previously at the substantive hearing.

g) All decisions had upheld Client A's right to privacy, which had been seriously compromised. There was now no compelling reason for Client A's sensitive medical information to be held by any third party where she had not given consent, not even the Court.

h) The defendant had incurred substantial legal costs in its pursuit of the matter and was entitled to be paid a contribution to those that had been awarded.

i) The interests of justice do not favour the granting of a stay.

Discussion

[32] Clause 5 of Sch 3 of the Act provides that an application for rehearing does not operate as a stay unless the Court so orders. Regulation 64(2) provides that if an application for a rehearing is made, the Court has power to order a stay of proceedings under the decision or order to which the application relates. The Court thereby has jurisdiction to consider the present application.

[33] Reference should be made to my earlier judgment of 17 September 201411 dealing with Ms Bracewell's first application for stay which fully describes the context. There I described orthodox stay principles modified now for the purposes of the present application for rehearing:

a. If no stay is granted, will the applicant's right to seek a rehearing be rendered nugatory?

b) Will the successful party be injuriously affected by a stay?

c) Is the application for rehearing prosecuted on a bona fide basis?

d) What is the novelty and importance of the questions involved?

[34] I deal first with the confidential information relating to Client A held by the Registrar. It is asserted that if the documents relating to Client A are returned to Richmond, those documents are at risk of being altered, destroyed or made inaccessible. Once again, Ms Bracewell has drawn significant and derogatory conclusions about Richmond as she has in respect of the Bay of Plenty DHB. That is a

serious allegation which is not for the purposes of the present application supported by any reliable evidence. All Ms Bracewell can point to is speculative assertion. That is insufficient for the purposes of a stay application when the Court has already considered the circumstances after a full hearing. Furthermore, I accept the submission made for Richmond that on the basis of the evidence filed there is no risk of the documents being destroyed. They are accurately indexed and could easily be identified were that necessary for subsequent purposes in this proceeding. Also

relevant is the observation of the Court of Appeal, to which I have already referred,

11 *Bracewell v Richmond Services Ltd*, above n 10.

that the precise nature of the confidential information disclosed was not material to this Court's decision.12 That being so, it is no longer necessary for the Court to continue to hold a copy of that information.

[35] I do not consider Ms Bracewell would be injuriously affected were the documents to be released. Nor do issues as to Ms Bracewell's bona fides in pursuing the application for rehearing require a different decision. Given that the matter has already been before the Court of Appeal, I do not consider that there are now any issues of novelty or importance to justify the continued custody over the documents by the Registrar.

[36] What is paramount now is Client A's right to have her personal and sensitive medical and other documents held by the body which is charged with the responsibility of her care, and which has the legal right to hold that information.

[37] Accordingly, I discharge the order of stay that directed the Registrar not to return the sealed envelope of documents to Richmond; that order of stay is to cease to have effect 28 days after the date of this judgment.

[38] The remaining issue is whether the costs which Ms Bracewell has been ordered to pay, now exceeding $17,000, should continue to be the subject of an order for stay.

[39] In my earlier judgment regarding the stay application, I stated that Ms Bracewell had provided no information relating to her financial circumstances and/or whether any prejudice would be occasioned, if there was no order for stay of execution of the cost orders.13 However, I indicated there were two related factors that suggested such an order would be appropriate:

a) If the Court of Appeal were to grant leave to appeal and subsequently allowed an appeal that might have implications for the orders for costs made in this Court; that factor pointed to the necessity of staying the

costs order in the meantime.

12 *Bracewell v Richmond Services Ltd*, above n 3, at [24].

13 *Bracewell v Richmond Services Ltd*, above n 10 at [20]-[21].

b) Ms Bracewell is not represented by a lawyer; therefore it would be inappropriate to draw the inference that she is unconcerned about costs from the fact that she had not referred in her application or submissions to financial issues.

[40] This is the second application for stay which Ms Bracewell has made. Again, no information or submissions have been provided as to prejudice if the costs orders take effect. It is no longer appropriate to give Ms Bracewell the benefit of any doubt on this issue given the observations made by the Court when dealing with the first stay application. Nor is there any evidence that Richmond could not, or would not, return to Ms Bracewell an amount equal to costs paid if that were necessary upon the Court ordering a rehearing and if the costs orders were subsequently set aside. In the absence of any evidence of prejudice if the costs orders are not stayed, it is appropriate to discharge the order of stay in respect of the costs orders; that order of stay is to cease to have effect 28 days after the date of this judgment.

[41] I reserve any issues as to costs with regard to the applications considered in this judgment.

B A Corkill

Judge

Judgment signed at 11.00 am on 7 May 2015