Employment Court of New Zealand

C v Air Nelson Limited [2010] NZEmpC 18 (9 March 2010)

Last Updated: 12 March 2010

IN THE EMPLOYMENT COURT

AUCKLAND [2010] NZEMPC 18ARC 7/10

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

AND IN THE MATTER OF an application for non-publication orders

BETWEEN C
Plaintiff

AND AIR NELSON LIMITED
Defendant

Hearing: 5 March 2010 (by telephone conference call)

Appearances: John Haigh QC, Counsel for Plaintiff
CH Toogood QC and Kevin Thompson, Counsel for Defendant

Judgment: 9 March 2010

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

A. **Until 16 April 2010 or earlier decision by the Court of Appeal against this Court's judgment refusing the plaintiff's application, neither the name of the plaintiff nor any details that may identify him, other than appear in this judgment, may be published pursuant to cl 12 of Schedule 3 to the Employment Relations Act 2000.**
B. **Exempted from this order are counsel for the parties and such senior managers of the defendant as may need to publish the plaintiff's identity for the purpose of preparing for the challenge in this Court.**
C. **Except for the original and copies of this judgment that go to the parties, all other copies are to refer to the plaintiff by the letter "C".**
D. **Leave is reserved for either party to apply for further orders if an appeal against this judgment is not able to be determined by 16 April 2010.**
E. **Except as set out above, the plaintiff's application for an order that his identity not be published is refused.**
F. **On the application of the defendant, and without opposition from the plaintiff, there will be an order under cl 12 of Schedule 3 to the Employment Relations Act 2000 that the name of the complainant (identified in this judgment by the letters "FA") or other details identifying her, are not to be published until the plaintiff's challenge can be heard and determined by this Court.**
G. **Costs are reserved.**

[1] The question that had to be determined urgently was whether the names of either or both of the parties and/or other details leading to their identification should be prohibited from publication under cl 12 of Schedule 3 to the Employment Relations Act 2000 ("the Act") and, if so, for how long.
[2] The plaintiff has challenged, by hearing de novo, the determination of the Employment Relations Authority that he was dismissed justifiably.
[3] In the Authority (AA 6/10), the names of the parties and particulars identifying them were prohibited from publication effectively until Monday 8 March 2010, being the expiry of the period within which the Authority's

determination could be challenged plus a further time after which the Authority would review its non-publication orders.

[4] Although, for all except some in the industry, the Authority's reference to the plaintiff as "C" has been an effective disguise of his identity, it is not difficult to narrow down from the Authority's determination the identity of the defendant described as "AL". An employer of pilots and cabin crew and, in particular, of two pilots and one cabin crew member, narrows the identity of the defendant down to two airlines, both wholly owned subsidiaries of the same parent airline. There are, however, two other persons in the saga whose identities were disguised and could not be published. These include the other pilot who is not a party to this litigation although he apparently suffered disciplinary sanctions short of dismissal. He remains in employment with the defendant, although the cabin crew member has not returned to operational flying duties, at least with the defendant.

[5] The plaintiff, as pilot in command of a commercial passenger aircraft, made an unscheduled overnight stop. The three crew members purchased alcohol en route to their accommodation and consumed this late into the night and even perhaps into the early hours of the following morning, later on which they would return to flying duties. The plaintiff, who is married with a young family, had sexual relations with the cabin crew member. He claimed that these were consensual but she said they were not. She complained promptly about these events and there were subsequent police and employment investigations. The plaintiff was not prosecuted as a result of the incident but the company's investigations resulted, first, in the plaintiff's suspension and, later, in his dismissal.

[6] The Authority did not elaborate on why it made its non-publication orders, whether in relation to the plaintiff and the defendant who are the immediate parties in this case now, or even to the other employees.

[7] Clause 12 of Schedule 3 to the Act governs the orders that may be made and provides:

12 Power to prohibit publication

(1) In any proceedings the Court may order that 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 Court thinks fit.

(2) Where proceedings are resolved by the Court making a consent order as to the terms of settlement, the Court may make an order prohibiting the publication of all or part of the contents of that settlement, subject to such conditions as the Court thinks fit.

[8] The Court is given a broad discretion to make orders that balance the justices of the particular parties' position and also the public interest in open justice.

[9] With the qualification that sexual intercourse was consensual, the plaintiff does not deny that the events that I have just described occurred. Rather, he says that his dismissal from employment was unjustified for a number of reasons going principally to the employer's procedure in reaching that conclusion. He also says that, in substance, a fair and reasonable employer in all the relevant circumstances would not have dismissed him as the company did. These are the tests of justification for dismissal or disadvantage in employment under s 103A of the Act.

[10] The defendant supports, and indeed advocates for, the continued non-publication of information identifying the complainant flight attendant in this case. Its counsel, Mr Toogood QC, points out that the identities of the employer and the plaintiff are already well known within the airline itself and perhaps more broadly within the pilot and passenger air transport communities as a result of events that took place before the Authority made a non-publication order.

[11] The plaintiff waited until the metaphorical last minute before applying to the Court for these orders. That was in spite of the Employment Relations Authority having determined the case in the defendant's favour on 13 January 2010 and a challenge by hearing de novo to that determination having been filed on 3 February 2010. In its determination the Authority had signalled that the non-publication orders it had made would continue only so long as might be required for this Court to consider them if a challenge was brought. I infer that the Authority was inclined not to make a permanent order in respect of the plaintiff's identity. It indicated to the parties that it would reconsider its orders on 8 March 2010. It was only on 3 March 2010 that the plaintiff applied to the Court for an interim order for non-publication, although not specifying for how long this should last and without any supporting evidence. The plaintiff simply submitted that if such an order was not made, the plaintiff stood "to suffer real and significant injury to his personal reputation even where his challenge de novo is successful." These circumstances were said to be "exceptional" and the plaintiff submits that "the administration of justice will be frustrated or rendered impracticable if the order sought is not made."

[12] Mr Haigh QC said that although the plaintiff accepts that he had sexual intercourse with FA following the consumption by them of substantial amounts of alcohol, the crucial issue for the plaintiff is that he says this was consensual. Mr Haigh said that it will be an important matter on the challenge in this Court to establish that the Employment Relations Authority wrongly found that sexual intercourse was probably non-consensual. I infer that the plaintiff's case will be that if intercourse is found to have been consensual, then this will be a significant element in a submission to the Court that the plaintiff's dismissal should be found to have been unjustified and that he should be reinstated in employment as a pilot in command, a captain.

[13] As Mr Toogood QC pointed out, however, the plaintiff was dismissed for a combination of reasons including

the excessive alcohol consumption by him and the other members of his crew before a known flight duty period, for his misconduct in participating in or at least allowing a crew under his direction to participate in such activities, as well as for his participation in what the employer concluded was at least unwanted, resented and distasteful sexual harassment of a member of his flight crew. As Mr Toogood pointed out, it is not the case for the defendant, and was not a critical finding of the Authority, that the sexual relations were non-consensual.

[14] The current statutory provision already set out is unchanged from that in the Employment Contracts Act 1991 under which there is relevant case law. In a case known as *Z v Y Ltd and A*[1] the then Chief Judge made clear the Employment Court's position about prohibiting publication of identity in cases of sexual harassment. He said:

(10) ... the freedom of expression guaranteed to all under the New Zealand Bill of Rights Act 1990, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society": s 5. It is implicit in the requirement that the Tribunal must do its work in public that it may impose only reasonable limits as prescribed by law (not by the Tribunal) upon public discussion of its public work. The only ground on which the Tribunal can make an order prohibiting publication is if, in the interests of justice, it is fair for it to do so having regard, not only to the interests of the parties and of witnesses and others directly affected, but also to the public interest in the case. Every member of the public has an interest in knowing how the Tribunal conducts its adjudications. Indeed, it is not the least bit surprising that far more publicity is accorded in newspapers to decisions of the Tribunal than of the Court – and not merely because the former are so much more numerous. The public has an intense interest in how the Tribunal discharges its function to deal in a just and speedy way with everyday workplace differences and disputes.

(11) In the majority of cases the interests of justice will require that the name of a grievant in a complaint of sexual harassment should be protected. The public interest is advanced by saying so because this amount of protection is likely to encourage the oppressed to come forward and bring their oppressors to justice without fearing the added punishment of the public exposure of their exploitation.

(12) When it comes to the alleged oppressor and the employer, the position is entirely different, especially if the Tribunal finds the case to be proved. Publicity then arguably serves an important purpose. It may be that good grounds can be found for making interim orders prohibiting publication but at the end of the day the world is probably entitled to know who the sexual harassers are and for whom they work and where, because that will enable their superiors and indeed compel them, to take steps to ensure that other employees will not be subjected to the conduct complained of and may also lead to the harasser changing his or her ways. As Virginia Grainer has pointed out in her article, sexual harassment flourishes in private. If it is kept secret, then once the particular complainant has gone there is little, if any, deterrent against the same offender victimising others in the same way. As Ms Grainer has written at p 134:

"While confidentiality is important to survivors who otherwise may be hesitant about coming forward with their complaints, there must be as much exposure of the matters surrounding sexual harassment as the survivors' desire for privacy will allow. The rationale for the publicity principle applies as much, if not more, in sexual harassment proceedings as elsewhere in our legal system. Sexual harassment flourishes in private. Exposing the problem is part of the cure. Sexual harassment procedures should not readily provide anonimity[!] for the harasser. The right to privacy for consenting adults engaged in sexual activity may not be an issue, but once a person misuses his power and subjects another person to sexual conduct that causes them unease or distress it is then appropriate for the public to be aware of the situation. Exposing the problem can facilitate both the victim and the harasser getting the assistance they require. Therefore, it is appropriate to allow name suppression only in cases where it is necessary to protect the survivor."

[15] Next, in *Sloggett v Taranaki Health Care Ltd*[2] and in declining to make an order for non-publication of the name of a grievant, the Court stated:

... it is appropriate to allow name suppression only in cases where it is necessary to protect the victim or the interests of the due administration of justice. ... relevant factors are the wishes of the victim; but where it is difficult to protect the victim's privacy without concealing also the name of the harasser or of the workplace, the need to reassure others similarly placed, and where that is an issue, ... the need to provide an appropriate climate in which the harasser, in the interests of other employees of the employer, can undergo and benefit from rehabilitation.

[16] Circumstances in other cases in which the Court has made orders prohibiting publication of individuals' identities depended on proof of real and substantial likelihood of undue harm, often to others but sometimes including to a party. Persuasive medical reasons underpinned the making of orders in *X v A*[3] and *A v Attorney-General*.[4] Other cases have included where publication of a party's identity would be likely to aggravate the serious illness of a close relative (*Air NZ Ltd v V*[5]) and where a serious risk of self-harm or suicide was established (*Y v D*[6]). That latter case was one of sexual harassment. As I have already noted, no evidence was offered in support of the plaintiff's application in this case.

[17] More generally, all courts emphasise the importance of the interests of the community in open justice, a real consideration even where no person appears to argue against non-publication on that ground.

[18] Mr Haigh referred to the judgment of the Court of Appeal in a criminal case, *P v The Queen*.[7] That was a case in which non-publication was sought of the name of an accused (a general surgeon) before trial on numerous

counts of sexual offending against youths and children. He asserted that if his name was published before trial his professional practice would be completely destroyed and he would not be able to continue working as a surgeon. The accused's wife was a secondary school teacher involved in special needs education. The accused was concerned about the effect of publication of his name on his wife's special needs students. There was evidence to support the potential of such adverse effects. Other grounds for non-publication included the potential effect on the accused's daughters and their ability to obtain and retain employment. The accused's elderly parents both suffered from significant medical problems and it was suggested that any further stress upon them caused by publication of the accused's name would result in further deterioration in their health.

[19] Here, the plaintiff's circumstances are very different from those of the accused in *P* and not only in relation to the nature of the proceedings and the risk of the consequences of a conviction. Except for the inarguable proposition that the plaintiff will be very significantly embarrassed by the revelation of his identity in connection with the established facts, as may be his wife and young children, there is no evidence at all of his circumstances or theirs except Mr Haigh's advice that the plaintiff is now working as a truck driver.

[20] I do not discount that what is sought is only an interim order until the plaintiff's challenge can be determined after which time the question of a permanent non-publication order could then be examined. That was the position in *X* (now *White*) *v Auckland District Health Board*.[8] By contrast with the circumstances in *X* however, in this case there has been a considered substantive determination of the grievance by the Employment Relations Authority. Here, also, there is no argument that the events about which the plaintiff is very embarrassed, took place. His contention is that they were consensual. Justification for dismissal, together with the practicability of reinstatement if dismissal was unjustified, will be the issues for the Court They will not turn on that distinction about consent, just as the employer's reasons for dismissal did not.

[21] Finally, even though, as Mr Haigh says, the plaintiff's identity is already well known within the communities of domestic airline pilots and perhaps even domestic airline employees, reinstatement in employment may be an issue if the Court finds that the plaintiff was dismissed unjustifiably. A very broad range of relevant considerations will be applicable to the test of practicability of reinstatement in these circumstances. This may include past similar conduct although that has not been relied upon by the employer, presumably because it knows of none. If, however, the plaintiff's name is able to be published, this may allow for or encourage the emergence of other instances of previous sexual harassment which may be relevant to the question of reinstatement. I do not, of course, suggest that the plaintiff has been guilty of such, but the ability to publish his name may ensure a more thorough examination of past events relevant to reinstatement.

[22] The plaintiff's principal concern appears to be about publicity concerning the sexual elements of the conduct that led to his dismissal. However, no less important in the defendant's view and the Authority's assessment was the excessive consumption of alcohol before a flight duty. So too was the plaintiff's lack of responsible leadership of a crew including his encouragement of and participation in that excessive consumption of alcohol in the circumstances. That is also a matter which, if it is not a single isolated incident, may affect the question of reinstatement and which the ability to publish the plaintiff's name may assist in identifying.

[23] The possibility of an appeal against my decision which Mr Haigh has signalled and which was the reason for making an interim order, need not affect progress of the challenge. The statement of defence having been filed and served and the Registrar having set aside a tentative five day hearing later in the year, there should now be a call-over of the case to deal with any other interlocutory matters and questions of timetable to trial.

[24] Costs are reserved on this application.

GL Colgan

Chief Judge

Judgment signed at 4.30pm on Tuesday 9 March 2010

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[1] [1993] 2 ERNZ 469.
[2] [1995] NZEmpC 92; [1995] 1 ERNZ 553.
[3] [1992] 2 ERNZ 1079.
[4] WC 1/00, 21 January 2000.
[5] (2009) 9 NZELC 93,209.
[6] [2004] 1 ERNZ 1.
[7] CA 260/96, 2 August 1996.
[8] [2007] ERNZ 66.

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