

**N THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 409
5604449

BETWEEN ANNA DAVIDSON
Applicant

AND GREAT BARRIER AIRLINES
LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Greg Bennett, Advocate for the Applicant
No attendance for the Respondent

Investigation Meeting: By telephone conference on 14 December 2016

Determination: 15 December 2016

FURTHER DETERMINATION OF THE AUTHORITY

- A. The application for an urgent interim order prohibiting publication of an Authority determination on costs and penalty, *Davidson v Great Barrier Airlines Limited* [2016] NZERA Auckland 403, issued to the parties on 9 December 2016, is declined.**
- B. As an administrative measure, in order to preserve the status quo in the event this determination declining to grant the order sought is challenged in the Employment Court, arrangements have been made for the determination on costs and penalty not to be published on the publicly-accessible Employment Law Database website before Wednesday, 21 December 2016.**

The application

[1] By written application on 14 December 2016 Greg Bennett, in the name of the applicant Anna Davidson, sought “an urgent interim non-publication order in respect of a determination on costs and penalty” issued to the parties by the Authority on 9

December 2016.¹ The determination ordered Ms Davidson to pay Great Barrier Airlines Limited (GBAL) \$7000 as costs and Mr Bennett to pay a penalty of \$4000 under s 134A of the Employment Relations Act 2000 (the Act) for obstructing and delaying an Authority investigation. Mr Bennett was ordered to pay \$2000 of the penalty to GBAL and \$2000 of the penalty to Ms Davidson.

[2] The application for an urgent order said the determination on costs and penalty was being challenged, on a de novo basis. An earlier determination, dismissing Ms Davidson's personal grievance application, is already under challenge.²

[3] Mr Bennett sought the order prohibiting publication of the determination on costs and penalty on the basis that he had been "ambushed" at an investigation meeting held to consider whether a penalty should be imposed on him.

[4] The application said "as a state actor, the Authority [must] ... comply strictly with the requirements of natural justice". It said "the Authority member failed to provide any information of documentation prior to the investigation meeting ... as to what documents the Authority member had obtained or what information or to who he had spoken". It said "as a result of this breach of natural justice, [Mr Bennett] was unprepared and therefore unable to comment fully on matters raised".

[5] The application also said the Authority had not spoken to Mr Bennett's GP but had relied on a letter from the GP, dated 1 December 2016, so that "caused the Authority to not be fully informed of all the medical facts and the Authority was second guessing what had been occurring". Mr Bennett had provided the letter to the Authority.

[6] The application ended with the statement that not granting the order sought "pending the outcome of the de novo challenge would result in a substantial miscarriage of justice".

Considering the application

[7] The application was considered on an urgent basis. Mr Bennett was offered and accepted an opportunity to attend a conference by telephone to be heard on it.

¹ *Davidson v Great Barrier Airlines Limited* [2016] NZERA Auckland 403.

² *Davidson v Great Barrier Airlines Limited* [2016] NZERA Auckland 362, under challenge as Employment Court matter 316/2016.

GBAL's representative was also contacted and declined the opportunity to attend. Mr Bennett's submissions, made during the telephone call, have been considered later in this determination.

[8] Mr Bennett confirmed that the purpose of the application was to prevent, for the meanwhile, the determination on costs and penalty being published on the Employment Law Database, a website maintained by the Ministry of Business information service. The database is accessible to the public through a link on the Authority's website and directly at <http://apps.employment.govt.nz/determinations>. He also confirmed the application concerned the part of the determination about the penalty, not the costs, awarded. He said Ms Davidson was aware of the application and had given instructions to make it. He also confirmed that, while the written application had referred to an investigation meeting on costs and penalty, held on 8 December, that investigation meeting was held solely for the purpose of addressing the penalty matter and, as usual, costs had been dealt with by way of written memoranda only. Mr Bennett had been offered the opportunity to be heard on the penalty in writing and in person. He had elected to do both. He lodged a written memorandum on 6 December and attended the 8 December investigation meeting.

[9] From enquiries I had an Authority Officer make to the Registry of the Employment Court, I understand that, also on 14 December, Mr Bennett had also filed amendments to the statement of claim already filed in the Court challenging the Authority's substantive determination on Ms Davidson's personal grievance. He was also said to have filed an "urgent application for a stay". I do not know the content of those amendments or the 'stay' application.

Mr Bennett's submissions

[10] In his oral submissions Mr Bennett said declining the order sought could cause "significant and irreversible damage". He submitted the following three grounds supported the order being made:

- (i) the Authority had breached the Bill of Rights, in its investigation meeting and determination on the penalty, by referring to documents not provided to Mr Bennett and not disclosing who had been spoken to and what information was relied on; and

- (ii) There was a prospect that his children would be affected by any fallout from publication of the determination; and
- (iii) Publication could cause significant emotional damage to him, which his GP was concerned about.

(i) *Information relied on by the Authority in breach of natural justice?*

[11] Mr Bennett did not elaborate on his reference to the Bill of Rights. I took him to be referring to section 27 of the New Zealand Bill of Rights Act 1990 expressing the right of every person to have any tribunal or public authority making a determination on that person's obligations to observe the principles of natural justice. The Authority has a specific statutory obligation to comply with those principles: Employment Relations Act 2000, s 157(2) and 173(1).

[12] The Court hearing a challenge would ultimately determine the merits of that argument but, because it was raised as a ground for the interim non-publication order sought, it needed to be addressed in this determination. It was wrong to say the penalty imposed on Mr Bennett was determined on the basis of information not disclosed to him in advance of the 8 December investigation meeting.

[13] Mr Bennett was advised in a case management conference on 22 July of his prospective liability to a penalty. The Member's Minute issued after the conference recorded the prospect. In the substantive determination issued on 4 November the grounds on which a penalty was being considered, on the Authority's own motion, were set out:

[50] Three circumstances may render Mr Bennett, and his assistant Sonia Ryder, liable for a penalty under s 134A of the Act, on the Authority's own motion:

- (i) An apparent failure to advise Ms Davidson of the timetable directions and investigation meeting set for 1 June 2016 at the first case management conference on 11 March; and
- (ii) The lodging of a witness statement, in the name of Ms Davidson, on 21 April 2016, which Ms Davidson subsequently said she had not seen or approved before it was lodged; and
- (iii) Information given to Ms Davidson on 29 May that it was "incorrect" that an investigation meeting was to be held on 1 June.

[51] This third circumstance resulted from an email query made by Ms Davidson to Ms Ryder on 29 May. Ms Davidson had learned from "a source" at GBAL that the investigation meeting was scheduled to be held on 1 June. Ms Ryder replied on 29 May that Ms Davidson was "incorrect re the date".

No application for postponement of the notified investigation meeting had been made to the Authority by 29 May. Contrary to what Ms Ryder told Ms Davidson, it was correct at that time that Ms Davidson 'case' was 'to be heard' on 1 June, under a Notice of Investigation Meeting issued on 14 March.

[14] By Minute of 16 November Mr Bennett was provided the opportunity to be heard on the penalty issue, in writing and, if he chose, in person. As already noted he elected both options.

[15] The determination on penalty issued on 9 December referred to documents and information undoubtedly in the possession and knowledge of Mr Bennett. Much of the chronology and background was set out by referring to emails sent to or from him or his business assistant and wife Sonia Ryder. In the 8 December investigation meeting he took responsibility for the actions of Ms Ryder in his business and said emails sent by her were sent on his instructions.

[16] Other documents referred to in that determination included Member's Minutes sent to him and two Authority determinations in which he was the representative of a party and reference was made to his conduct of the case.

[17] There were only two documents referred to that had not been sent to him or sent by him or Ms Ryder. Everything else was available in his files and email records.

[18] One was an email Ms Davidson sent to an Authority Officer on 3 June. It disclosed Ms Davidson had not seen a witness statement lodged in her name before it was lodged and said she was "not happy at all with the statement apparently done by me, which it was not". A copy of that email was sent to Mr Bennett with the Minute of 22 July. There was no doubt he was well aware of it.

[19] The other document referred to in the determination that Mr Bennett may not have seen (unless Ms Davidson showed it to him) was an email she sent an Authority Officer on 7 June saying that she was "in the process of obtaining new counsel". It was not material to any issue determined but was simply part of the chronology in which she, eventually, continued to have Mr Bennett represent her.

[20] The Authority could not disclose to Mr Bennett any information from people "spoken to" about the penalty matter because there was nobody in that category, apart

from conversations that occurred at the case management conferences and investigation meetings at which Mr Bennett was present. The only other relevant information from a person was what Ms Davidson said in her 3 June email and the Authority had provided that email to Mr Bennett on 22 July.

[21] In short, there was no relevant information or document that Mr Bennett did not know about, and have in his possession, in advance of the 8 December investigation meeting. He was specifically asked at the investigation meeting if there were any further matters on which he wanted to make submissions or comment. He confirmed there was not.

[22] It was Mr Bennett who had proposed he provide health information that he said was relevant to what had happened with his handling of Ms Davidson's case. He made that suggestion at the case management conference on 22 July. In making arrangements to determine the penalty matter, the Authority gave Mr Bennett an opportunity to provide medical or health information in support of any submission he wished to make. The only restriction on doing so was that he provided it before the investigation meeting, not at it. He had expressed some concern about GBAL's representative seeing the information. The Authority proposed he could disclose the information on a tentative basis, for the Authority's initial assessment without providing it to GBAL, but that arrangement proved unnecessary once GBAL's representative (helpfully) said she did not want to see it anyway. The limited nature of what Mr Bennett did then provide was entirely his responsibility.

(ii) *Prospect of effect on his children?*

[23] In his oral submission Mr Bennett referred to the Employment Court decision in *H v A Limited*, a case in which an order was made prohibiting publication of the name of the parties because of health concerns for the applicant's son.³ Mr Bennett submitted there was a "prospect" his children (aged 9, 11 and 15) would be affected by any "fallout" from the penalty determination.

[24] In *H v A Limited* the Court considered the circumstances in which the Authority and the Court could exercise their respective broad discretions to depart, in a principled way, from the starting point of 'open justice' in employment cases. It

³ [2014] NZEmpC 92.

noted orders prohibiting publication of names and other identifying particulars were exceptional and made in “a very small minority of cases”. Familiar examples concerned commercially sensitive information that might be misused by a competitor, where disclosure of information might physically endanger workers or create security risks, where people criticised had not had an opportunity to challenge or refute the criticism, or where information about incidental third parties (such as hospital patients) was disclosed.⁴

[25] The Court in *H v A Limited* had then granted an order prohibiting publication of the parties’ names because the son of the applicant was found to be at “real risk of adverse consequences” and “serious challenges” if his father’s name was published. The Court’s conclusion was based on the report of a registered clinical psychologist about the child’s particular diagnosed condition and psychological history.

[26] Mr Bennett identified no such level of sensitivity or vulnerability for his children and no medical information about them was provided or referred to in support of that particular ground for the order.

(iii) Risk of emotional damage?

[27] The third ground Mr Bennett advanced was similarly speculative and unsupported by any independent evidence. He said his GP had said she was concerned about the effect on him of the determination “going public”.

Conclusion

[28] The Court in *H v A Limited* held the standard warranting a non-publication order was not high but the circumstances still needed to be in some way exceptional. None of the grounds or arguments advanced by Mr Bennett for the order he sought came close to establishing his circumstances were out of the ordinary or created a real risk of a “substantial miscarriage of justice”. Determinations of the Authority that are under challenge in the Court typically refer to parties and people who are concerned about the effect on their reputation of negative findings and order for payments made in those determinations. It is rare for the Authority’s determinations to be suppressed until the challenge is decided. If the Court does find the Authority’s conclusion in any matter was disproportionate or ill-founded, the Authority determination is set

⁴ *H v A Limited*, above n 3, at [76], [78] and [80].

aside and the Court's decision substituted. The position is remedied by the superior nature and status of the Court's decision. Mr Bennett is in no different situation than other parties and people.

[29] Accordingly, the application for an 'interim' order prohibiting publication of the Authority determination on costs and penalty has been declined.

[30] Mr Bennett has a right to challenge this determination on that application. If he did so and the Court was persuaded to make the order, it would be unhelpful if the Authority had meanwhile published the determination. In order to not render nugatory his opportunity to make such a challenge, some common sense arrangement was needed in this particular situation to, briefly, preserve his right to do so and the status quo.

[31] As an administrative measure I have arranged for the determination on costs and penalty to be withheld from the usual routine for 'uploading' to the Employment Law Database until at least Wednesday, 21 December 2016. It provides a 'window' for Mr Bennett to decide if he wants to ask the Court to consider the question (as a challenge to this determination) and for the Court to make an order prohibiting publication of the costs and penalty determination if it decided such an order was appropriate. If this administrative 'hold' arrangement was not made, the determination would have been expected to be uploaded on Thursday, 15 December or Tuesday, 20 December. If nothing happens meanwhile, it would likely be uploaded on Thursday, 22 December.

Robin Arthur
Member of the Employment Relations Authority