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FGH v RST [2018] NZEmpC 1 (2 February 2018)

Last Updated: 8 February 2018

IN THE EMPLOYMENT COURT WELLINGTON

[\[2018\] NZEmpC 1](#)

EMPC 259/2017

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

AND IN THE MATTER of an application for an interim
 non- publication order

BETWEEN FGH Plaintiff

AND RST Defendant

Hearing: (on the papers filed on 27 October 2017, 26 and 30
 January
 2018)

Appearances: S Henderson, counsel for plaintiff
 S Dyhrberg, counsel for defendant

Judgment: 2 February 2018

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves an application for an interim non-publication order of the names and identifying details of the parties. If granted, the order would affect the extent to which the determinations relating to the plaintiff's challenge could be published.

[2] By way of background, a substantive determination was issued by the

Employment Relations Authority (the Authority) on 22 August 2017.¹ The investigation meeting to which the determination related took place some time

¹ *FGH v RST* [2017] NZERA Wellington 78.

earlier, between 19 September and 26 October 2016; it was followed by the provision of submissions between 18 November and 22 December 2016.

[3] Three subsequent determinations, dated 24 August,² 7 September,³ and

21 September 2017⁴ were issued by the Authority on the topic of non-publication.

[4] In the 7 September determination, the Authority Member stated:⁵

Accordingly, I grant the application and order there be a prohibition on publishing the original determination before 21 September 2017. At that time the status of this order and/or the way in which the parties are identified in the determination can be revisited with the outcome being informed by the Court's decision.

[5] The plaintiff brought a challenge to the substantive determination on

14 September 2017. I shall say a little more about the matters which are the subject of the challenge shortly.

[6] On 15 September 2017, I convened a telephone directions conference for the purposes of an urgent application for an interim non-publication order, that application having been filed with the challenge. After hearing counsel, and on the basis of a medical certificate from the plaintiff's general practitioner (GP) dated

31 August 2017, I concluded that it was appropriate to make an interim order for a very short period, which would allow both sides to file documents for the purposes of an urgent hearing on the topic of non-publication. An appropriate timetable was directed.

[7] To preserve the status quo, I directed that until further order of the Court no person was to publish the names of the parties to the proceeding, or any version of the determinations of the Authority to which the proceeding related, which may contain the names of or otherwise identify the parties. As I noted at the time, this order was in the same form as had been approved by the full Court in the course of

the *H v A Ltd* litigation.⁶

2 *FGH v RST* [2017] NZERA Wellington 80.

3 *FGH v RST* [2017] NZERA Wellington 85.

4 *FHG v RST* [2017] NZERA Wellington 89.

5 At [6] (footnotes omitted).

6 *H v A Ltd* [2014] NZEmpC 69 at [9].

[8] The third determination issued by the Authority on 21 September 2017, revisited the topic of non-publication. It ordered a prohibition on adding the substantive determination to MBIE's public database or otherwise distributing it beyond the parties, until it was either amended or rewritten in an anonymised form.⁷

The Authority concluded that a decision about the next step would await the Court's

further consideration of the plaintiff's application for an interim order.

[9] Although a hearing for the application for a non-publication order was initially set down for 4 October 2017, because the parties requested the convening of a Judicial Settlement Conference (JSC), I discussed with counsel the possibility of deferring the hearing until after that event. This was agreed.

[10] The JSC took place on 18 December 2017; it did not result in a resolution of the challenge.

[11] The application for non-publication was rescheduled for hearing on

30 January 2018. Subsequently counsel advised that there was no objection to the application being resolved on the papers.

[12] It is important to note that the defendant abides the decision of the Court on this application.

The challenge

[13] The matter that was considered by the Authority related to claims of unjustifiable disadvantage by various actions of the defendant over an extended period. The plaintiff said that her employer failed to provide a safe work environment despite her having raised concerns on multiple occasions, and failed to impartially administer its own disciplinary policies when addressing issues it had raised as to performance, thus subjecting her to unwarranted stress.

[14] It is alleged that from 13 July 2015, there were interactions between the parties relating to the plaintiff's performance which included a disciplinary process

⁷ *FHG v RST*, above n 4.

that was commenced but not concluded. In the course of these events, the plaintiff raised concerns that she was being bullied at her place of work.

[15] From 26 February 2016, the plaintiff ceased attending her workplace as a result of a medical condition which she says was affected by the workplace events. However, on 9 May 2016, she indicated she could return to work on reduced working hours, as certified by her GP. The parties were then unable to agree the basis on which she could return to work.

[16] These issues became the subject of a personal grievance and then the relationship problem which came before the Authority. It dismissed the plaintiff's claims.

[17] In the plaintiff's de novo challenge to this Court, issues are raised as to the processes adopted by the employer in dealing with the plaintiff's performance issues and bullying assertions. Amongst the various allegations is one that the defendant engaged in "adverse conduct" as defined in the Health and Safety at Work Act 2015. It is asserted that as a consequence of the defendant's conduct, the plaintiff was ill for an extended period, and that she had suffered humiliation, loss of dignity and injury to feelings.

[18] The employer strongly resists every allegation which is made against it.

[19] I record that the challenge has now been set down for hearing on 14, 15, 27 and 28 March 2018.

Counsel's submissions

[20] For the plaintiff, Mr Henderson submitted that the present application for non-publication arises in a context where there are health and safety issues concerning an existing employee, rather than one relating to confidential information held by a former employee. He submitted that the defendant therefore continued to have duties of care and good faith towards the plaintiff, and that it would be inconsistent with such duties for the defendant to insist on publication of information

which would identify her, potentially causing significant adverse consequences. Mr Henderson stated, in short, that if publication occurred there was evidence of a risk of harm to the plaintiff's health and wellbeing.

[21] Also relevant, he said, was the fact that the Authority had not properly examined the contractual and legislative context within which the plaintiff's circumstances had to be assessed; and it had taken nearly a year after the initial investigation meeting for the Authority to issue its determination, which caused further distress for the plaintiff.

[22] Mr Henderson went on to refer to the evidence which had been filed in support of the application. First, he emphasised the contents of a short report obtained from the plaintiff's GP. She confirmed caring for the plaintiff for some eight years. The doctor explained a particular condition suffered by the plaintiff, and the means by which the condition could be managed. She made brief comments as to the impact of the events on the plaintiff, and then stated that she believed the publication of any decision which criticised the plaintiff's work performance would carry a high risk of escalating her condition. She strongly recommended that any such decision be "withheld" having regard to a risk of loss of function, which she explained had gradually improved through 2016 and into 2017.

[23] Counsel also referred to an affidavit provided by the plaintiff's father. He said the plaintiff was deeply depressed by the content of the determination. About a week after it was issued, an event occurred which led him to conclude that his daughter needed immediate treatment at a hospital to safeguard her continued wellbeing. However, after some hours of waiting for admission, the plaintiff and her father left the hospital so that other positive initiatives could be undertaken. The plaintiff's father also explained other steps that were being taken, which he said could be compromised by publication. Mr Henderson submitted that it had to be recognised there was at least a risk of self harm.

[24] In summary, Mr Henderson submitted that these matters were sufficiently significant as to meet the test outlined in applicable case law, which I shall summarise shortly.

[25] Ms Dyhrberg, counsel for the defendant, also filed a submission. She made brief submissions explaining the legal and factual position, and confirmed that the defendant would abide the Court's view on the interim application.

Discussion

[26] The present application falls for consideration under cl 12 of Sch 3 of the

[Employment Relations Act 2000](#) (the Act) which 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.

...

[27] This provision is similar to cl 10 of Sch 2 to the Act, which provides the Authority with a similar discretion. In *Crimson Consulting Ltd v Berry* I considered the correct approach in respect of that discretion, and concluded:⁸

[A]n applicant for a non-publication order under the Act is not required to establish exceptional circumstances, though the standard for departing from the principle that justice should be administered openly is high. The party seeking such an order must show specific adverse consequences which would justify a departure from the fundamental rule. A case-specific balancing of the competing factors is required. The position may be different at the interim stage.

[28] At this stage, there are a number of factors which point to the fact that it is desirable to continue the interim order already made by the Court, until trial.

[29] The first of these are the factual circumstances outlined in the supporting affidavits. In short, the plaintiff suffers from a particular condition which, on the limited evidence which has been filed to date, suggests that the subject events affected her to the point where she had to take sick leave for an extended period; and there were issues as to the basis on which she might return.

[30] In addition, there is the evidence provided by the plaintiff's father as to the serious circumstances which arose after the issuing of the determination, some 11 months following the investigation meeting. He says that his daughter was at risk to herself following receipt of the Authority's determination. Publication issues have to be assessed in that context.

[31] The plaintiff's GP, who has attended the plaintiff for some years, considers that there is a high risk of stress-related symptoms being precipitated by publication. She has strongly recommended that given such a risk, publication should not occur.

[32] Although the evidence currently before the Court is brief and untested, it is appropriate to rely on it for interim purposes. It satisfies me that there are sufficient adverse consequences as to justify a departure from the fundamental rule of publication, on an interim basis. The circumstances are such that the names and identifying details of the parties to the present proceeding should not be published whether via the Authority's determinations or otherwise.

[33] This conclusion is reinforced by the fact that this issue can no doubt be reviewed more fully at the hearing, which will take place next month.

[34] It is also significant that for interim purposes the defendant abides the decision of the Court, rather than opposing that application.

[35] The plaintiff's application accordingly succeeds. The order made by the Court on 15 September 2017 will stand.⁹ That is, until further order of the Court no person is to publish the names of the parties to this proceeding, or any version of the determinations of the Authority to which this proceeding relates, which may contain the names of, or otherwise identify, the parties.

[36] Costs are reserved.

B A Corkill

Judge

Judgment signed at 12.30 pm on 2 February 2018

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