



# Employment Court of New Zealand

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## H v A Limited [2014] NZEmpC 69 (13 May 2014)

Last Updated: 20 May 2014

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2014\] NZEmpC 69](#)

ARC 3/14

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

AND IN THE MATTER    of an application by APNZ News  
Service to search court file

BETWEEN                H Plaintiff

AND                      A LIMITED Defendant

Court:                    Chief Judge GL Colgan  
Judge Christina Inglis

Hearing:                Judge ME Perkins

By submissions filed on 3, 14 and 29 April  
2014

Judgment:              13 May 2014

### INTERLOCUTORY JUDGMENT OF THE FULL COURT

[1] APNZ News Service (APNZ) has applied to the Court to search the file in this proceeding. The application was made on a printed form with the reason for APNZ's request being "To identify the status of suppressions of an Employment Relations Authority matter and construct [an] argument against their permanent order".

[2] The application was referred to the parties for submissions on 4 April 2014

and these have now been filed. Both parties oppose APNZ's application to search the court file.

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[3] The history and status of these proceedings are as follows. On 13 December

2013 the Employment Relations Authority (the Authority) refused the plaintiff's application that it prohibit publication of his name and other particulars that might identify him pending the Authority's determination of the plaintiff's substantive personal grievance of unjustified dismissal.<sup>1</sup> On the same date, however, the Authority nevertheless made a limited order prohibiting publication of such information until 20 January 2014, allowing the plaintiff time to inform his family and to exercise his rights of appeal. The plaintiff challenged this determination on

13 January 2014.

[4] On 17 January 2014 the Court made the following interim orders.

5. Pursuant to cl 12 of Schedule 3 to the Employment Relations Act

2000 I make an order prohibiting publication of the names of the plaintiff and the defendant or any particulars that may lead to their identification. I

also make an order similarly prohibiting publication of the name or any other

information identifying the complainant employee of the defendant. No

person, except the parties' representatives, may search or otherwise have access to the relevant files of the Court without leave of a Judge.

6. The foregoing are interim orders that apply until further order of the Court. These interim orders will be for review by the Court at the hearing of the plaintiff's challenge. In any accounts of the proceedings in this Court published, the plaintiff will be referred to by the letter "H" and the defendant by "A Ltd".

[5] The plaintiff's challenge to the Authority's refusal to make non-publication orders was heard by a full Court on 24 February 2014 and the Court's judgment has been reserved and not yet delivered. The case also raises an important issue of the Court's powers under [s 179\(5\)](#) of the [Employment Relations Act 2000](#) (the Act), which will be dealt with by the Court in its judgment before any consideration of the merits of the plaintiff's challenge if the Court is empowered to consider that challenge.

[6] The Authority has recently determined the plaintiff's substantive grievance.<sup>2</sup>

It found that he was dismissed justifiably. The plaintiff has filed a challenge to that determination.

*1 A v B Ltd* [2013] NZERA Auckland 575.

[7] The Authority has confirmed the existence of non-publication orders in its substantive determination of 4 April 2014:<sup>3</sup>

[2] There are non-publication orders currently in place. There is an interim non-publication made by the Employment Court until further order of the Court. The order prohibits publication of the names of the parties and the complainant employee and any particulars that may lead to their identification.<sup>4</sup> By consent the Authority made a similar order.<sup>5</sup>

[8] The Court has made a further interim order on the file (ARC 27/14) relating to the plaintiff's challenge. This interim order was made urgently during the Easter vacation and is as follows:

3. Until further order of the Court, no person is to publish the names of the parties to this proceeding or the determination of the Employment Relations Authority to which it relates. This order extends to the non- publication of any information that may identify those parties.

4. Further, no person may search the Court's file, or that of the

Employment Relations Authority, without the leave of a judge.

[9] In view of the Authority's publication beyond the immediate parties of an anonymised version of its determination on 11 April 2014, it is appropriate to now vary the order numbered 3 above made in this Court on 18 April 2014. That order will now read:

3. Until further order of the Court, no person is to publish the names of the parties to this proceeding or any version of the determination of the Employment Relations Authority to which it relates which may contain the names of, or otherwise identify the parties.

[10] The plaintiff's challenge to the Authority's substantive determination is still in its very early stages. The defendant has not yet filed its statement of defence. Given the probable duration of the hearing of the challenge it is unlikely to be until late July 2014 at the earliest, and perhaps later, even without delays that may be occasioned if there are any other interlocutory complexities.

[11] The plaintiff's opposition to APNZ's request to search the court file is put on the following basis. First, he says that it does not require access to the file "to

<sup>3</sup> The Authority's redacted determination was issued publicly on 11 April 2014.

<sup>4</sup> Minute dated 17 January [2014 ARC 3/14](#).

identify the status of suppressions of an Employment Relations Authority matter" because that status was explained to APNZ's reporter orally by the Authority Member at its investigation meeting on 1 April 2014. Further, the plaintiff says that certain documents and extracts advising the status of the non-publication orders were provided to the reporter on that date. These documents are said to have included the

Authority's interim determination of 20 January 2014,<sup>6</sup> part of a memorandum of

counsel for the parties filed in the Authority, and part of the Court's earlier orders.

[12] Addressing APNZ's second ground for seeking leave to search the court file (to "construct [an] argument against their permanent order"), the plaintiff says that this is both misconceived and premature. The plaintiff says that if the reference to "their permanent order" is to an order of the Authority, APNZ has no need to access the Employment Court file for that or any related purpose. If the permanent order referred to in the application is a reference to the Court, the plaintiff says that there is, and has been, no "permanent

order” made by the Court and no party has applied for such an order.

[13] Next, the plaintiff says that his privacy grounds on which interim orders have been granted are genuine. They include sensitive private information including medical information about a child, and the orders have been made to protect confidentiality, including the confidentiality of the child.

[14] As to the Court’s power to make the orders that it has prohibiting access to the Court’s file without leave of a Judge and, logically, to grant the leave that APNZ seeks, the plaintiff submits that the Court, as a court of record ([s 186](#) of the Act), has inherent power to control access to its files. That was established in *Ranchhod v*

*Auckland Healthcare Services Ltd*.<sup>7</sup> By virtue of reg 6 of the Employment Court Regulations 2000, the Court is also empowered to do so pursuant to the relevant High Court Rules, in particular, r 3.16 of Subpart 2 of Part 3.

[15] Counsel for the plaintiff emphasises the applicability of the matters listed in High Court r 3.16 including:

- the orderly and fair administration of justice;
- the protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any

privilege held by, or available to, any person;

- the principle of open justice, namely encouraging fair and accurate

reporting of, and comment on, court hearings and decisions; and

the freedom to seek, receive and impart information.

[16] The plaintiff also relies on cases which have recognised the need for a “recognisable and legitimate public or private purpose” for seeking access to court files: *Commerce Commission v Air New Zealand Ltd*<sup>8</sup> and *McCully v Whangamata*

*Marina Society Inc*.<sup>9</sup>

[17] Next, the plaintiff submits that open justice principles do not apply with the same force at this preliminary stage of litigation: *X v Standards Committee (No 1) of the New Zealand Law Society*;<sup>10</sup> *X v Standards Committee (No 1) of the New Zealand*

*Law Society*;<sup>11</sup> and *Hart v Standards Committee (No 1) of the New Zealand Law*

*Society*.<sup>12</sup>

[18] Emphasising the principal ground for the making of the orders relating to a child’s medical condition, counsel submits that this may be a decisive factor against granting access: *Auckland District Health Board v E*.<sup>13</sup>

[19] In summary, the plaintiff submits that APNZ’s stated reasons do not disclose

a good, recognisable, or legitimate public or private purpose.

<sup>8</sup> *Commerce Commission v Air New Zealand Ltd* [\[2012\] NZHC 271](#), [2012] NZLJ 301 at [\[30\]](#).

<sup>9</sup> *McCully v Whangamata Marina Society Ltd* [\[2006\] NZCA 209](#); [\[2007\] 1 NZLR 185 \(CA\)](#).

<sup>10</sup> *X v Standards Committee (No 1) of the New Zealand Law Society* HC Auckland CIV-2011-404-

7750, 13 December 2011 at [59].

<sup>11</sup> *X v Standards Committee (No 1) of the New Zealand Law Society* [\[2011\] NZCA 676](#).

<sup>12</sup> *Hart v Standards Committee (No 1) of the New Zealand Law Society* [\[2012\] NZSC 4](#).

[20] Finally, addressing the factors of open justice, the need to encourage fair and accurate reporting, and of freedom to seek and receive information, the plaintiff reminds the Court that representatives of the news media (including APNZ) were allowed to attend the hearing before the full Court and the Authority’s substantive investigation meeting. Those persons will also have access to the anonymised determination of the Authority and to its interim determinations, as well as having been provided with certain Court and Authority documents or extracts of those. In these circumstances, the plaintiff says that the principles of open justice are appropriately protected and preserved.

[21] We will not reiterate those grounds on which the defendant agrees with the plaintiff in opposing APNZ’s application. It originally

opposed the making of interim orders in both the Authority and the Court. However, the defendant now recognises that there are orders in place and considers that it is appropriate that the proper effect be given to these. That would be at risk if consent were to be given to search the court file unless there is a “compelling” reason for doing so but which the defendant says APNZ has not shown.

[22] The defendant says that although there is no application currently before the Court for a permanent non-publication order, it would not be opposed to APNZ being notified of any such application if it is made in future and, we infer, being heard again, either in support of its application to search the file, or to make submissions on whether there should be any permanent order.

[23] Finally, the defendant says that APNZ will have sufficient information from the redacted version of the Authority’s determination, together with having had a reporter in attendance at part of the investigation meeting, to be able to make submissions opposing any non-publication order if it wishes to do so. Correctly, the defendant says that a search of the Court file will not provide any further information relevant to the arguments which might arise in considering an application for a permanent order.

[24] For all of the reasons articulated by the parties in their written submissions, and with which we agree and adopt, we decline APNZ’s application to search the court file.

GL Colgan  
Chief Judge  
for the full Court

Judgment signed at 9 am on Tuesday 13 May 2014

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