

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 520
5351974**

BETWEEN VERONICA KLOETEN
 Applicant

AND COMBINED TANNING
 SUPPLIES LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Geoff Downey, Advocate for Applicant
 Janita Wright for Respondent

Investigation Meeting: On the papers

Submissions received: 6 December 2011 from Applicant and Respondent

Determination: 8 December 2011

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

The Applications

[1] Ms Wright, director and shareholder of the Respondent, Combined Tanning Supplies Limited (“CTSL”), has applied for a Non Publication Order. The application is made on the ground that media attention could impact on another matter which is before the courts, namely the case of *Crown v Petricevic* which is set down for trial next year, and in which Ms Wright is a witness.

[2] Mr Downey for the Applicant, Ms Veronica Kloeten, opposes such an order on the basis that there is no connection between the matter before the Authority and the *Crown v Petricevic* case.

The Principles

[3] The principles of open justice and the right to freedom of expression are rights which go to the very existence and vigour of our political and legal institutions¹

[4] As observed by Lord Hewart in *R v Sussex Justices, Ex parte McCarthy*² it is fundamental to our legal system that justice is not only done, but that it is also seen to be done. This is the principle of open justice, which serves a wider purpose than the interest represented in the particular case. It is critical to the maintenance of public confidence in the system of justice³

[5] The *New Zealand Bill of Rights Act* 1990 recognises freedom of expression as a democratic and civil right:

a. Freedom of expression

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form

[6] Departure from the general rule of public justice is generally held to be accepted as not being lightly granted, and moreover that public justice requires the identification of all aspects of the litigation. In *Clark v Attorney-General*⁴ the Court of Appeal said:⁵

[T]he principles of open justice and the related freedom of expression create a presumption in favour of disclosure of all aspects of Court proceedings which can be overcome only in exceptional circumstances

[7] These fundamental principles are well established in New Zealand, and there is a presumption in courts and tribunals that all evidence should be given in public and be reported freely⁶.

[8] However the Authority is not like other courts and tribunals. It has unique powers of investigation, which the Employment Court has recognised as making the formal principles less applicable:⁷

¹ *Suppressing Names and Evidence*, New Zealand Law Commission, Report 109, October 2009 at page 7.

² [1924] 1 KB 256 at 259

³ *Lewis v Wilson & Horton Ltd v Others*, CA 131/00, 29 August 2000, para [79]

⁴ [2005] NZAR 481 (CA)

⁵ *Ibid* at para [42]

⁶ *Anderson v The Employment Tribunal* [1992] 1 ERNZ 500

While the principles in Anderson certainly apply to hearings in conventional Courts and tribunals, the flexibility accorded to the Authority to run an investigation and make its own inquiries rather than conducting a formal hearing make these formal principles less applicable. The presumption that all evidence should be given in public and freely reportable may therefore not have the force that it had in relation to the Employment Tribunal.

[9] Whilst endorsing that view, I consider that the principle of open justice must remain an important consideration for the Authority when exercising its powers of investigation, particularly given the unique character of the institution.

[10] In this respect I note that despite its informal nature, the Authority operates in an inquisitorial manner, making determinations of a substantive nature regarding legal rights, some of which may be highly invasive in nature, i.e. injunctive orders relating to reinstatement.

[11] Secondly I highlight that the Authority is in charge of its own proceedings. There is no legal right to challenge the proceedings of the Authority pursuant to the privative provisions of sections 177(4), 178(6), 179(5) and 184(1A) of the Employment Relations Act 2000 (“the Act”). Falling within these privative provisions of the Act are orders as to suppression of the names of the parties, or of evidence, and exclusion of the public.

[12] For these reasons, I find it compelling that the manner in which the Authority operates is open and transparent, and consequently hold that there must be extraordinary reasons why the principle of open justice should not apply.

[13] The powers of the Authority, despite the restrictions on challenge and review set out in the privative provisions of the Act, are not to be exercised other than by having regard to the provisions of the Act, and in a reasonable and principled manner.

Determination

[14] I appreciate that there has been media attention focused on Ms Wright as a result of her involvement in the *Crown v Petricevic* case, and that Ms Wright has found this to be stressful and distressing.

⁷ *Davis v BNZ* [2004] 2 ERNZ at para [16] per Shaw J

[15] Whilst I acknowledge Ms Wright's concern about publicity impacting on her involvement in the *Crown v Petricevic* case, I find that there is no connection between that matter and the Authority's scheduled Investigation Meeting, such that evidence traversed at the Authority's Investigation Meeting would have an adverse impact in the matter before another Court

[16] In these circumstances I find that there is no extraordinary reason for displacing the principle of open justice and decline the Non Publication Order sought.

Eleanor Robinson
Member of the Employment Relations Authority