Employment Court of New Zealand

McKinlay v Wellington Cosmetic Clinic Limited [2021] NZEmpC 125 (9 August 2021)

Last Updated: 12 August 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[2021] NZEmpC 125
EMPC 388/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JOANNE MCKINLAY Plaintiff
AND	WELLINGTON COSMETIC CLINIC LIMITED Defendant

Hearing:	28 May 2021 (Heard at Wellington)
Appearances:	P McKenzie-Bridle, counsel for plaintiff Dr R Jones, agent for defendant
Judgment:	9 August 2021

JUDGMENT OF JUDGE B A CORKILL

Background

[1] A challenge was brought to a substantive determination of the Employment Relations Authority which concerned various claims including disadvantage and dismissal grievances;1 a second challenge was also brought to a related costs determination.2 The challenges were brought by an employer, Wellington Cosmetic Clinic Ltd (WCCL). The employee was Ms Joanne McKinlay. A director of WCCL, Dr Jones, had maintained a personal relationship with Ms McKinlay.

1 *OST v EPB Ltd* [2019] NZERA 133 (Member Loftus).

2 *OST v EPB Ltd* [2019] NZERA 181 (costs determination).

[2] Ultimately, the challenges were discontinued in this Court. In a judgment of 4 December 2020, Judge Perkins dealt with the issue of costs following the filing of the discontinuance.3

[3] That left a significant issue as to non-publication of name, which this judgment resolves.

[4] The circumstances are a little unusual. In its determination, the Authority had said that Ms McKinlay requested the identity of the parties to be suppressed, citing provisions of the Family Court Act 1980 (FCA). The Authority concluded that the provisions of that Act meant such an order had to be made, since reference was contained in the determination to details of a domestic violence proceeding which Ms McKinlay had placed before the Family Court.

[5] Ms McKinlay, in the context of the challenges which were brought originally, asserted that her position had not been

correctly recorded. When the challenges were discontinued, she was no longer able to advance her concerns. It therefore became necessary for her to bring her own challenge, so that the issue could be dealt with.

Judge Perkins extended time to enable this.4

[6] Ms McKinlay then filed her own challenge, pleading that the Authority had erred in making the order for non-publication which she had not sought at the time, and which she did not want now. For its part, WCCL resists Ms McKinlay's challenge on the basis the Authority correctly ordered non-publication of names and identifying details.

[7] The company, in effect, also seeks a permanent non-publication order for the purposes of the challenge now brought in this Court.

[8] In the result, the two related matters now requiring resolution by the Court are:

3 *EPB Ltd v OST* [2020] NZEmpC 218 at [23]–[30].

4 At [15–[21].

(a) Whether the Authority had erred in fact or in law in making orders of non-publication of names; and

(b) whether this Court should make a permanent order of non-publication of names in the proceedings which came before the Court.

[9] The parties agreed that affidavit evidence would be filed for the purposes of the two matters the Court had to resolve, along with other relevant documents.

The Authority's determination as to non-publication

[10] Mr McKenzie-Bridle, counsel for Ms McKinlay, outlined the background to the non-publication orders ultimately made by the Authority in its determination.

[11] He said that prior to the investigation meeting, Dr Jones on behalf of WCCL had sought a non-publication order in relation to a contentious email which Ms McKinlay intended to produce to the Authority.

[12] This was opposed by Ms McKinlay who through counsel, argued that exceptional circumstances would have to apply before such an order could be justified. It had been submitted these did not exist.

[13] Subsequently, the company via Dr Jones sought non-publication orders in relation to certain passages of his intended brief of evidence. It was asserted the orders were necessary to avoid adverse consequences for Ms McKinlay's future employment, as well as Dr Jones' business as a health practitioner.

[14] This application was opposed. Mr McKenzie-Bridle also argued that certain documents which Dr Jones wished to produce should be ruled inadmissible; they had previously been produced to the Family Court when Ms McKinlay had applied for a protection order. He told the Authority that s 11B of the FCA provided a statutory bar against publication of Family Court proceedings without leave of that Court. Such leave had not been obtained.

[15] In a memorandum of 13 June 2018 the Authority dealt with these issues. Referring to the email, the Authority said non-publication would not be ordered, although that issue could be revisited at the investigation meeting, depending on how the evidence emerged.

[16] On the admissibility issue, the Member ruled that the contested documents should remain before the Authority in the interim, with this issue also to be discussed at the investigation meeting.5

[17] Counsel informed the Court that these issues were not discussed in the course of the investigation meeting, which commenced on 28 June 2018. They were, however, referred to by the Authority when issuing its determination of 7 March 2019.

It said:6

[68] During the investigation [Ms McKinlay] asked the identity of the parties be suppressed and in doing so cited the Family Court Act 1980.

[69] Suppression is granted where the circumstances of a case outweigh the principle of open justice. Such circumstances

exist where there is a real risk the administration of justice would be frustrated or rendered impractical.

[70] The Family Court Act precludes the reporting of information which might identify a vulnerable person. [Ms McKinlay] falls within the definition of a vulnerable person.

[71] To identify [Ms McKinlay] would also identify [Dr Jones] and [WCCL] to anyone with knowledge of their affairs so identification of any of the above would, I conclude, undermine the administration of justice by potentially breaching the Family Court Act. As a result I order a prohibition on the publication of anything which might identify the parties.

[18] The issue as to what had been requested prior to the investigation meeting also featured in the costs determination as a result of submissions made by Mr McKenzie- Bridle as to the history of the non-publication issues.

[19] After dealing with costs issues, the Authority said in its costs determination of 28 March 2019:7

5 At [7].

6. *OST v EPB Ltd*, above n 1, at [68]−[71] (footnotes omitted). The parties names were anonymised by the Authority.

7 *OST v EPB Ltd*, above n 2.

[17] On the issue of suppression I disagree with Mr McKenzie-Bridle on one key point and that is whether or not suppression was originally sought. My notes indicate it was sought at the commencement of the investigation during a discussion about whether or not [Ms McKinlay's] application to the Family Court was admissible. While I considered the application admissible I advised a decision about suppression would come later. As it transpired that was not discussed again and I subsequently granted [Ms McKinlay] the order she originally, though it may now be said inadvertently, sought.

[18] While I accept [Ms McKinlay] has the right to change her mind I also note the present disagreement between the parties as to the effect of [the] Family Court Act 1980, even if the position each originally took is diametrically opposed to their current view. The substantive determination has been challenged and as suppression forms part of that decision it is arguable the matter is now before the Court and I should not alter it.

[19] If that is not correct but, as [WCCL] now asserts, my conclusions about the effect of the Family Court Act are, a lifting of the order would have the effect of frustrating the administration of justice. In the circumstances I consider it appropriate I leave the present order in place and have its ongoing status considered by the Court.

[20] On 21 March 2019, WCCL initiated its de novo challenge. For the purposes of the non-publication issues which the Court would need to consider in the context of the challenge, on 16 August 2019 Ms McKinlay filed an application in the Family Court under s 11B of the FCA. Essentially, she sought leave for the names of the parties to be published; as well as the fact she had brought domestic violence proceedings against Dr Jones. She argued that all of these matters should be referred to in the employment-related proceedings.

[21] In a judgment of 24 August 2020, Judge O'Dwyer undertook a detailed review of all the circumstances, both in that Court and in the Authority.8 She made orders which effectively permitted publication of certain facts that had been referred to by the Authority in its determination. Accordingly, I reproduce the relevant parts of the Family Court's order:9

(1) The parties' names can be published.
(2) Publication is limited to any report containing only the following references to the family court proceedings:
(a) that an application for a protection order and occupation order was filed on an ex parte basis on 10 July 2017.10

8 *McKinley v Jones* [2020] NZFC 6584.

9 At [71].

10 *OST v EPB Ltd*, above n 1 at [20].

(b) that Dr Jones was not aware of the application until 12 July 2017.11

(c) that an affidavit was lodged by Dr Jones with the Family Court.12

(d) that Ms McKinlay discontinued her application for a protection order and occupation order on 7 August 2017.

(e) that Ms McKinlay referred to her employment in her application for a protection order.13

(f) that the application was unrelated to the parties' employment relationship.14

(g) that Dr Jones relied on Ms McKinlay making the application [as] termination of her employment.15

(h) that Ms McKinlay is a vulnerable person within the meaning of section 11D (h) of the Act.16

...

[22] Given these orders, there is now no impediment under s 11B of the FCA to the publication of those particular facts as recorded in the Authority's determination.

Submissions as to non-publication

[23] Mr McKenzie-Bridle submitted Ms McKinlay had never sought non- publication of her name in light of the provisions of the FCA. Rather, she had argued that certain evidence was inadmissible because the requisite leave had not been obtained from the Family Court.

[24] Counsel submitted that the Authority accordingly proceeded in error, both in the way in which the issue was treated in the determination, and in the summary given in its costs determination. Mr McKenzie-Bridle also submitted that a further error arose because the parties had not been heard on these issues at the substantive hearing, as had been intended; he said this was a breach of Ms McKinlay's natural justice rights.

11 At [20].

12 At [12].

13 At [33].

14 At [48].

15 At [35].

16 At [70].

[25] Finally, it was submitted that in any event, the subsequent developments in the Family Court, where it granted leave for certain facts to be published, meant the provisions of s 11B were no longer relevant.

[26] Dr Jones made no submissions on these particular points, inviting the Court only to review the documents which had been placed before it.

Analysis

[27] I am satisfied that an inadvertent error did occur in the course of the investigation, resulting in a misunderstanding as to whether Ms McKinlay was seeking a non-publication order outright because of the effect of s 11B of the FCA.

[28] Moreover, it would now be erroneous for the Authority's order to stand, since the Family Court has granted leave for publication of the relevant facts as recorded by the Authority in its determination.

[29] It remains to consider whether the Authority should have made an order for non-publication on any other ground.

[30] In addressing this question, I proceed on the basis that although an applicant for a non-publication order under the Employment Relations Act 2000 is not required to establish exceptional circumstances, 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 that fundamental rule. A case-specific balancing of the competing factors is required.17

[31] Dr Jones said he could not understand why Ms McKinlay would want personal details of their dispute to be made public, particularly when she withdrew her application from the Family Court in any event.

[32] Ms McKinlay has made it clear that at no time did she seek suppression of those details. She said she went to some lengths to bring her case in the Authority,

17 *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511 at [96].

with considerable opposition. As she put it in her affidavit, one of the main reasons she took her case was to have her day in court and to stand up for herself. She had wanted to prove that she had been wronged. For her, it was a significant matter that she had succeeded in a public forum.

[33] Returning to Dr Jones' position, at best it could be said that he has sought an order to protect his professional reputation. There are two responses to this point. The first is that he personally was not the employer. WCCL, a company of which Dr Jones was a director, held that responsibility. Dr Jones was one of its two directors. I accept Mr McKenzie-Bridle's submission that the presumption under the Companies Act 1993 is that directors are required to be identifiable persons.18

[34] A related point is that the employment-related problems between Dr Jones and Ms McKinlay occurred in a professional context, namely the operation of a business by an entity which provided health services where she worked as a receptionist. That there was also a personal dimension to the relationship between Ms McKinlay and Dr Jones was correctly regarded by the Authority as being a separate issue which should not have impacted on the employment relationship.

[35] Given all these factors, any potential harm to Dr Jones' reputation is not a relevant consideration. There was no focus at the investigation meeting on Dr Jones' skills as a health practitioner, but rather on his acts and omissions when acting as director of the employing company. I consider that the public interest requires those matters to be known.

[36] Another ground raised by WCCL was that it employed other persons, as did a related entity. It was argued that the reputation of those entities and their employees would be damaged by publication of Ms McKinlay's employment relationship problem. I do not accept that this could be a qualifying ground. The circumstances do not reflect on other employees in any way; nor indeed on the provision of health services by them or, as I have said, by Dr Jones. The sole issue relates to the justification of the steps taken by WCCL as employer.

18 For example ss 12 and 131–138 of the Companies Act 1993.

[37] The case involved the orthodox application of employment law principles. The circumstances were not so unusual as to require non-publication orders.

[38] In its statement of defence, WCCL pleaded that it would not, in any event, now have any objection to its name being published. The inference was that Dr Jones' name, however, should be protected. However, as Mr McKenzie-Bridle submitted, any member of the public would be able to search the company's name on the Companies Register and ascertain that there were two directors. Dr Jones was one of them. The other resides overseas. An order protecting Dr Jones' name in these circumstances would be futile because he could be readily identified.

[39] Finally, I consider Dr Jones' point that the real reason Ms McKinlay wished to oppose non-publication was for the purposes of vindication, and so that she could go to the media.

[40] In response, Mr McKenzie-Bridle said there was no evidence either of vindication or intent to promote publication elsewhere. Rather, as already indicated, Ms McKinlay wished to be able to say that she had defended her position and established she was correct, succeeding in substance in the Authority, on obtaining leave out of time, and in obtaining the orders she did from the Family Court, all of which had been opposed by Dr Jones or by WCCL apparently on his behalf.

[41] Whether or not the issues are referred to in the media is not a relevant consideration. Rather, the question is whether the paramount principle of open justice should prevail, which includes the right of the media to report on the affairs of the Authority or Court.

Result

[42] I am satisfied that the Authority erred in fact and in law in making the order for non-publication, and that there is no proper reason for such an order to stand. I allow Ms McKinlay's challenge.

[43] Similarly, there is no basis for a permanent order of non-publication of name for the purposes of the proceedings in this Court.

[44] Costs are reserved. These should follow the event. They should be assessed on a 2B basis. If the quantum of costs payable by WCCL to Ms McKinlay cannot be resolved within 21 days, she may make an application, supported by necessary documentation. Any response from WCCL should be filed within a like period thereafter.

B A Corkill Judge

Judgment signed at 2.20 pm on 9 August 2021