Employment Court of New Zealand

Pilgrim v Attorney-General [2022] NZEmpC 162 (6 September 2022)

Last Updated: 8 September 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2022] NZEmpC 162
EMPC 85/2022

IN THE MATTER OF	a declaration under s 6(5) of the Employment Relations Act 2000
AND IN THE MATTER OF	an application for in-Court media coverage
BETWEEN	SERENITY PILGRIM, ANNA COURAGE, ROSE STANDTRUE, CRYSTAL LOYAL, PEARL VALOR AND VIRGINIA COURAGE Plaintiffs
AND	THE ATTORNEY-GENERAL SUED ON BEHALF OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT, LABOUR INSPECTORATE First Defendant
AND	HOWARD TEMPLE, SAMUEL VALOR, FAITHFUL PILGRIM, NOAH HOPEFUL AND STEPHEN STANDFAST Second Defendants

Hearing:	1 and 5 September 2022 (Heard at Wellington and Christchurch via telephone)
Appearances:	BP Henry, D Gates and S Patterson, counsel for plaintiffs G La Hood and A Piaggi, counsel for first defendant P Skelton QC, SG Wilson, J Hurren, C Pearce and H Rossie, counsel for second defendants R Kirkness, counsel assisting the Court D Brown, counsel for Mr B M Zintl, counsel for Mr A and Mr C R Stewart, counsel for Radio New Zealand, Television New Zealand and New Zealand Media and Entertainment CS Foster, counsel for Newshub
Judgment:	6 September 2022

SERENITY PILGRIM, ANNA COURAGE, ROSE STANDTRUE, CRYSTAL LOYAL, PEARL VALOR AND VIRGINIA COURAGE v THE ATTORNEY-GENERAL SUED ON BEHALF OF THE MINISTRY OF

BUSINESS, INNOVATION AND EMPLOYMENT, LABOUR INSPECTORATE [2022] NZEmpC 162 [6

September 2022]

INTERLOCUTORY JUDGMENT (NO 15) OF JUDGE B A CORKILL

(Application for in-Court media coverage)

Introduction

[1] This judgment finalises the means by which certain paragraphs of the evidence of Virginia Courage should be taken at the hearing which is currently proceeding.

The admissibility judgment

[2] Not long before the hearing commenced, the Court was required to consider a range of issues as to the admissibility of evidence. Some of the objections related to alleged sexual offending, including by individuals whose circumstances were currently before the criminal courts. I was advised that one of those persons had been acquitted but currently had name and fact suppression orders in his favour: Mr A. I was also informed that two further individuals currently face prosecutions, where it was contended there could be an overlap at the trial with evidence that the plaintiffs wish to adduce: Mr B and Mr C.1

[3] I was advised by counsel for the Attorney-General that four of the plaintiffs' witnesses who had filed briefs in this Court would be witnesses in the criminal trial. Some of their impugned evidence overlapped with evidence they would give during the prosecutions. In particular, the brief of Mrs Courage went into detail about the alleged offending of both accused, including as to complaints she would say she made to the Gloriavale leaders. I was not informed of the names of the other three witnesses involved.2

[4] After reviewing relevant authorities as to whether it was appropriate to receive evidence in a civil case, when there is a pending criminal trial, I concluded that the evidence of Mrs Courage about Mr B and Mr C should be admitted on a provisional

1 *Pilgrim v Attorney-General* [2022] NZEmpC 145 at [138]–[168].

2 At [156].

basis, but with a focus on evidence of complaints in which she had been involved, since that evidence may have a more direct relevance to the issue of control by the leadership than other evidence she might have given.3

[5] I also determined, however, that evidence from other witnesses to be called by the plaintiffs about Mr B and/or Mr C should not be admitted, since the Court did not know who other potential witnesses in the criminal trials – complainants or otherwise

– would be. I noted the Court could not manage potential fair trial issues if relevant overlapping witnesses were unidentified.4

[6] I then made rulings as to which aspects of Mrs Courage's brief should be admitted on a provisional basis.5

[7] I also made interim non-publication orders in respect of Mr A, Mr B and Mr

C. I said that the names of those persons were to be anonymised in open court, such as by the use of letters of the alphabet.6

[8] I also made interim non-publication orders in respect of persons who have statutory protection of name, and identifying details, as described in sch B to the judgment. I stated that counsel would need to confer for the purposes of developing a means by which such persons would not be identified in open court, for consideration of the trial Judge.7 The judgment was issued on 18 August 2022.

Non-publication orders

[9] At the commencement of the hearing on 29 August 2022, the trial Judge, Chief Judge Inglis, considered an application which had been made by the Attorney-General on 26 August 2022 relating to suppression orders that had been made in the criminal jurisdiction.

3 At [166].

4 At [167].

5 Schedule A, at 9–14.

6 At [196].

7 At [197].

[10] She noted that the Court may order that all or any part of any evidence given and/or the name of any witness or other person not be published subject to such conditions as the Court thinks fit. Suppression orders had been made in respect of the names and identifying details of various individuals, and mirror orders had been made in the admissibility judgment of 18 August 2022 on an interim basis to ensure that existing orders in the criminal jurisdiction were not undermined. She also noted that there was a recognised need to ensure that fair trial rights were maintained and protected.

[11] The Chief Judge recorded that counsel had then sought, on an agreed basis, orders in relation to some of the evidence that would be given, or may be given, during the course of the proceedings. She was satisfied that it was appropriate to do so in light of the considerations to which she had referred.

[12] Chief Judge Inglis said it was also appropriate to put in place broader interim non-publication orders to prevent the publication of such evidence. For present purposes, the following orders were then made:

(a) There was to be no media recording of certain paragraphs of the evidence of Mrs Courage, namely paras 101–108 (inclusive), and paras 127–165 (inclusive).
(b) Counsel for the second defendants and counsel assisting the Court were to alert the Court before beginning any questioning on evidence that overlapped with the criminal prosecutions so that the Court could order the media to pause recording.
(c) Counsel for the plaintiffs was to alert the Court before he started any examination in chief or re-examination on overlapping evidence, so that the Court could order the media to pause recording.
(d) There was an interim non-publication order in relation to any evidence given during those times that the Court orders, or had ordered, that

recording be paused, an order made under cl 12 of sch 3 to the Employment Relations Act 2000.

Application by counsel for accused persons

[13] On 1 September 2022, Mr Brown, counsel for Mr B, and Mr Zintl, counsel for Mr A and Mr C, were granted leave to be heard in relation to fair trial matters. They wished to notify the Court of the issues which they said appeared to arise from the admissibility directions I had made. I heard all counsel, and Mr Brown and Mr Zintl, promptly.

[14] In the course of discussions with counsel, it was proposed by Mr Skelton QC, counsel for the second defendants, that a fair balancing of open justice principles and fair trial rights would be achieved by receiving particular paragraphs of Mrs Courage's evidence in camera. All other counsel supported this possibility.

[15] This is a rare step. However, the authorities are clear that, if it is absolutely necessary for the administration of justice, the Court may sit behind closed doors, and when it does so, the hearing is in camera.8 When making such an order, it may direct certain persons, or all persons except those specified, to remove themselves from the courtroom during the proceeding.

[16] The Employment Court has a jurisdiction to make such an order if satisfied that the necessary threshold of extraordinary circumstances is met.9

[17] Given these considerations, the consensus of counsel and the necessary balancing of the fundamental principles of open justice, and also the very important principles relating to an accused's right to fair trial, I was satisfied that the necessary threshold was met.

8 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [3].

9. *Q v Commissioner of Police* [2015] NZEmpC 8, [2015] ERNZ 202 at [20]–[23]; *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511 at [140]–[145]. As to the flexible nature of any such direction, see *Tucker v News Media Ownership Ltd* [1986] NZHC 216; [1986] 2 NZLR 716 (HC) at 720.

[18] I directed that the evidence contained in paras 101–165 of the brief of evidence of Mrs Courage, and any further questioning thereon, was to be heard in camera. I stated that those who may be present for that evidence would be

counsel, the remaining plaintiffs and the second defendants.10

[19] I noted that the balance of the evidence of Mrs Courage was to be heard in open court.

[20] I recorded that Mr Henry, counsel for the plaintiffs, had raised an issue as to whether cross-examination of witnesses to be called by the second defendants would be assisted by the making of what he described as a blanket suppression order in respect of Mr B and Mr C – that is, one that does not have the limitations referred to in sch B to the Court's admissibility judgment.

[21] Mr Skelton opposed such a possibility, pointing out that this would effectively circumvent the protections provided by an in camera arrangement because it would mean questioning would be undertaken in respect of Mr B and Mr C in open court, and in the presence of the media. Mr La Hood, counsel for the Attorney-General, and Mr Kirkness, counsel assisting the Court, echoed Mr Skelton's concerns.

[22] I held that the question of any cross-examination of witnesses of the second defendants about Mr B and Mr C would need to be raised in advance with the trial Judge, including whether any such questioning should be heard in camera.

[23] I recorded that Mr Brown and Mr Zintl indicated they would wish to be heard in respect of any such application. I noted that whether that was appropriate would be a matter for the trial Judge.

[24] At the point when Mrs Courage's evidence came to be called on 2 September 2022, Chief Judge Inglis informed the Court, which included media representatives, that a ruling had been made late the previous day that certain parts of Mrs Courage's evidence, and questions relating to that evidence, were to be heard in camera. She said that meant that there were restrictions on the people who could remain in the

10 This order replaced para [4](a) of the Court's Ruling (No 2) of 29 August 2022.

courtroom during that time. These would be counsel, the plaintiffs and the second defendants. The orders had been made to preserve fair trial rights. This meant that Mrs Courage would be called to give evidence in open court until the point was reached to which the Court's ruling related. The courtroom would then be cleared, other than the people identified in the ruling. Once that part of the evidence had been dealt with, open court proceedings would resume.

Application by media parties

[25] Counsel for media parties then sought leave to be heard since that had not occurred when the possibility of an in camera hearing had been initially considered. It had proceeded on the basis that, if exclusion of the public was necessary, then "... applying the strict standard required to justify it, it would usually not be right to make an exception in favour of the press."11

[26] Because, however, there are rare instances where a contrary view has been taken,12 arrangements were made to hear all counsel promptly. That hearing took place late yesterday.

[27] At the hearing, Mr Stewart, counsel for three media organisations, focused on the proposition that media representatives be present at any in camera hearing rather than on the possibility of recission of the Court's earlier directions.

[28] Mr Stewart addressed what he understood to be the primary concern of counsel for the accused, relating to the risk of leaks which could affect fair trial rights. He argued that no such occurrences had occurred in this proceeding to date. He submitted that it would be preferable for the various media representatives who are attending the hearing to be able to attend any in camera hearing so as to ensure reporting is accurate.

[29] Ms Foster, counsel for a fourth media organisation, added that the starting point which the Court should assume is that responsible media outlets will comply with orders of the Court.

11 *Re Crook* [1992] 2 All ER 687 (CA) at 694.

12 *Tucker v News Media Ownership Ltd*, above n 9, at 720.

[30] Mr Brown and Mr Zintl submitted that inadvertent leaks from the media had occurred in other cases in the past where there were non-publication or other such orders, and that such a possibility threatened to imperil the fair trial rights of Mr B and Mr C. It was submitted that the subject evidence was likely to be salacious, enhancing the possibility that protected evidence would be published.

[31] Mr Patterson, counsel for the plaintiffs, repeated a submission that I received on behalf of the plaintiffs on 1

September 2022, to the effect that the Court should make a blanket non-publication order, and that this would be sufficient. I had not accepted that submission previously. I do not agree that it would now provide a satisfactory answer.

[32] Mr La Hood submitted that maintaining the existing order, and allowing the media to be present, would provide a satisfactory balance between open justice and fair trial rights. In discussion with the bench, he agreed that making an interim order until further order of the Court in respect of evidence received in camera would be appropriate, in that it would allow for the possibility of publication of the evidence if the circumstances of any of the accused persons altered.13

[33] Mr Skelton submitted that the order made on 1 September 2022 would suffice. He said it would represent appropriate balancing, and that it was unnecessary to extend the order, as now sought. He said that extensive reporting is taking place. He was concerned that the accused persons would have no ability to defend themselves so that a conservative approach was justified to protect their positions. He acknowledged that if the media were to be present, however, an interim non-publication order would be appropriate.

[34] Mr Kirkness also agreed that a balancing of fair trial rights and open justice considerations was required, and considered that this could be achieved if the media were to be present.

[35] In response, Mr Stewart again emphasised the importance of members of the media being able to clearly delineate between evidence that could be reported at this

13 This step was taken in *Tucker v News Media Ownership Ltd*, above n 9, at 720.

stage, and evidence that could not. He said this could be achieved by the order sought. Mr Stewart repeated that although the media does from time to time make errors inadvertently when suppression orders applied, the circumstances proposed here of a clear delineation in the hearing of the evidence would mitigate against such a possibility. Ms Foster adopted Mr Stewart's submission.

[36] I am advised that there are some six media representatives present at the hearing, as well as two camera persons. Whilst some media representatives have remained throughout, as Mr Stewart acknowledged, that is not always possible for a variety of reasons in a long case. Continuity of reporting is not, therefore, necessarily straightforward. Delineation would therefore be appropriate.

[37] The key point of prejudice raised in respect of fair trial rights relates to the risk of leaks. I accept, on the basis of Mr Stewart's submission, that there is always such a risk when protective orders are made. But it is usually a remote risk. The Court is entitled to expect – especially in a case attracting considerable attention as in this instance – that all media representatives will be as diligent as possible when discharging their responsibility to report fairly and in accordance with the directions of the Court.

[38] Accordingly, I accept that it is appropriate for accredited media representatives to be able to attend the taking of any evidence in camera. This step will more likely ensure that there can be no suspicion that the hearing is being conducted "secretly" as Mr Stewart put it. I find the right of accredited reporters to attend as surrogates of the public is, in the circumstances, appropriate.

[39] I also accept the submission that in this particular case, attendance of media representatives will facilitate a clear delineation between evidence that can be published because it is heard in open court, and evidence that cannot be published because it is heard in camera, unless it is specifically authorised for publication by the Court.

Result

[40] Balancing the important presumption of open justice against the right of accused persons to a fair trial, I rule that members of the accredited media may attend the in camera hearing of Mrs Courage's evidence, along with any plaintiff and any second defendant who chooses to attend.

[41] However, I make an interim non-publication order in respect of any evidence received in camera, which will continue until further order of the Court. There is to be no recording or filming of evidence taken in camera.

[42] Costs are reserved.

BA Corkill Judge

Judgment signed at 11.55 am on 6 September 2022