

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 57/10
5291231**

BETWEEN HEMIMATENGA WARENA RAU
Applicant

AND WAIKATO-TAINUI TE
KAUHANGANUI INCORPORATED
Respondent

Member of Authority: Leon Robinson

Representatives: Kalev Crossland, Counsel for Applicant
 John Haigh QC and Tim Clarke, Counsel for Respondent

Investigation Meeting: 2 February 2010 at Hamilton

Determination: 9 February 2010

REASONS FOR DETERMINATION OF THE AUTHORITY

The applications

[1] At the commencement of the investigation meeting held at Hamilton on 2 February 2010, I heard evidence and argument in support of an opposed application by the respondent Waikato-Tainui Te Kauhanganui Incorporated for orders that:-

- (i) the investigation meeting should not be held in public;
- (ii) alternatively, that all persons associated with the media and press (including reporters and journalists) be excluded from attending the investigation meeting;
- (iii) further or alternatively, that the evidence given in these proceeding, pleadings filed, and names of any party or witness or other person not be published;
- (iv) the fact of the application and the decision of the Authority not be published.

[2] Accepting as I do the sensitivities involved, I agreed that the orders sought were well-founded and meritorious. I considered a pragmatic approach was appropriate.

[3] I refused to make the orders as sought but I made orders pursuant to Clause 10(1) of Schedule 2 to the *Employment Relations Act 2000* ("the Act") **that the pleadings filed are not to be published and the Authority's file is not to be inspected without order by the Authority.** These are my reasons.

The principles

[4] The principle of open justice and the right to freedom of expression are rights which go to the very existence and health of our political and legal institutions¹.

[5] It is fundamental in our legal system that not only should justice be done, but it must also be seen to be done². This is known as the principle of open justice. The principle of open justice 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.

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

14. 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.

[7] These fundamental principles are well established in New Zealand. It is accepted that in courts and tribunals there is a presumption that all evidence should be given in public and be freely reportable⁴.

[8] This Authority is unlike other courts and tribunals however. Owing to its unique powers of investigation, it has been recognised that the fundamental principles above may not have the same force, at least in comparison to this institution's predecessor. In *Davis v BNZ* the Employment Court said⁵:-

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

² *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart.

³ *Lewis -v- Wilson & Horton Ltd & others*, CA131/00, 29 August 2000, para [79].

⁴ *Anderson -v- The Employment Tribunal* [1992] 1 ERNZ 500.

⁵ [2004] 2 ERNZ 516 at para [16], Shaw J

[16] *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 those 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.***

(Emphasis added)

[9] I endorse that view. But the principle of open justice must properly remain a very important consideration when the Authority exercises its powers of investigation. The way in which the Authority operates must be seen to be done. There are important reasons why this is particularly so in relation to this specific institution.

[10] Firstly, despite the informal nature of the institution and its inquisitorial-like mode of operation, it is indisputable that it routinely makes determinative substantive orders as to legal rights and some of those powers are very invasive by their nature (injunctive orders including reinstatement).

[11] Secondly, the Authority is the master of its own procedure. The manner in which the Authority investigates is a matter of process. But there is no legal right to challenge the procedure the Authority has followed by virtue of the privative provisions of the Act at sections 177(4), 178(6), 179(5) and 184(1A). These include orders by the Authority in relation to whether the public should be excluded or whether evidence is suppressed⁶.

[12] For these particular reasons, I consider it is important that the way in which the Authority operates must be open for all to see and there must be extraordinary reasons why the principle of open justice should yield. Sunlight is still the best disinfectant⁷.

[13] Despite the restrictions on challenge and review, the Authority's powers are not exercised arbitrarily. They are exercised having regard to the objects of the Act, in a reasonable manner and always on the basis of principle.

⁶ See *Oldco PTI (NZ) Ltd v Houston* [2006] ERNZ 221

⁷ Justice Louis Brandeis US Supreme Court

The merits

[14] The Authority has the express power at section 160(1) of the Act to decide that an investigation meeting should not be in public or should not be open to certain persons.

[15] By Clause 10(1) of Schedule 2 to the Act the Authority has the power to prohibit publication:-

10 Power to prohibit publication

(1) The Authority may, in respect of any matter, 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 Authority thinks fit.

[16] There has already been publicity about the matters in contention between the parties. The circumstances in which the applicant Mr Rau was dismissed are already public knowledge. The fact of these proceedings and the identity of the parties are already publicly known. For that reason, I declined to order that the names of the parties be prohibited from publication.

[17] In relation to the orders sought that the public and the media be excluded from the investigation meeting I was not persuaded to conduct an investigation meeting in secret.

[18] While it is accepted that certain evidence and indeed the proceeding itself may cause embarrassment to the parties and possibly others, mere embarrassment is not sufficient. Embarrassment is not unique to these parties. I did not consider the particular contended embarrassment was, as a matter of fact and degree, sufficient that the principle of open justice should yield. It is for the same reason I declined to order that the fact of the application and the determination on it should be prohibited from publication.

[19] I accepted that the evidence as to the wider background traverses various issues and allegations involving other persons and other sensitive interests. In his affidavit in support of his application for reinstatement, Mr Rau refers to matters relating to the respondent's financial management. He offers criticism of various practices. I understood Mr Rau to raise such matters as constituting grounds for why he should be

reinstated as part of the overall justice considerations in the context of the application for interim reinstatement. But the application is no longer live. The question does not arise anymore.

[20] Criticisms or particulars demonstrative of a tension between governance and management are not relevant to the central dispute. Such matters, while interesting because they are controversial, are not relevant. This investigation is not a forum for parading tribal politics. It was my clear view that these points did not require investigation. I declined to permit them to feature in my investigation meeting. It is for the same reason I choose not to repeat those matters here.

[21] I regarded such matters as extraneous and irrelevant. The relevant inquiries in this investigation are those which go to the question of what a fair and reasonable employer would have done in all the circumstances at the time.

[22] However, to protect the interests of various non-parties and to avoid inappropriate and unnecessary controversy, I agreed that it was proper to order that the pleadings filed should not be published. I also ordered that the Authority's file is not to be inspected without order of the Authority.

Leon Robinson
Member of Employment Relations Authority