



Employment Court of New Zealand

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RPW v H [2018] NZEmpC 103 (6 September 2018)

Last Updated: 15 September 2018

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[\[2018\] NZEmpC 103](#)
EMPC 250/2018**

IN THE MATTER OF an application for a compliance order
under [s 140\(6\)](#) of the [Employment
Relations Act 2000](#)

AND IN THE MATTER OF an application for urgency and for an
abridgment of time to file any
statement of defence

AND IN THE MATTER OF an application for interim non-
publication order

BETWEEN RPW
Plaintiff

AND H
First Defendant

AND C
Second Defendant

EMPC 265/2018

IN THE MATTER OF an application for a compliance order
under [s 140\(6\)](#) of the [Employment
Relations Act 2000](#)

AND IN THE MATTER OF an application for urgency and for an
abridgment of time to file any
statement of defence

AND BETWEEN RPW
Plaintiff

AND H
First Defendant

AND C
Second Defendant

RPW v H NZEmpC AUCKLAND [\[2018\] NZEmpC 103](#) [6 September 2018]

Hearing: 6 September 2018
(Heard at Auckland)

Appearances: S Hood and C Fraser, counsel for plaintiff
No appearance for first or second
defendants

Judgment: 6 September 2018

ORAL JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] There are two sets of proceedings which have been filed in this matter which are actions between a Trust Board and an employment advocate and his corporate entity operating, in a provincial region. The advocate acted for a former employee of the Trust Board and that related to an employment relationship problem which went to formal mediation and was then settled by a mediator acting under the powers contained in the [Employment Relations Act 2000](#) (the Act).

[2] One of the conditions of the settlement that was reached was that the employee concerned and her advocate, who is now the first defendant in the proceedings before the Court, were not to make disparaging statements about the Trust Board.

[3] Allegations were made that there had been a breach of that condition, not by the employee, but by the advocate. The employee is still involved, however, because the advocate acted throughout as her agent and there is now a potential that the employee may for that reason also be liable for the breaches which have occurred. In any event the plaintiff Trust Board, being the applicant in proceedings in the Employment Relations Authority (the Authority), pursued the advocate and his corporate entity and obtained compliance orders against them ordering that they comply with the term of the settlement that there was to be no disparagement.

[4] The Authority held that there had been breaches and on separate occasions made compliance orders. Those compliance orders, in turn, have been alleged by the plaintiff Trust Board to have been further breached, and in the proceedings which are

now filed with the Court, there are applications pursuant to [ss 138\(6\)](#) and [140\(6\)](#) of the Act for enforcement of the compliance orders which have been issued by the Authority.

[5] In addition to the proceedings having been filed in the Court, the plaintiff Trust Board has made an application that urgency be extended in both proceedings, so that the time prescribed for the defendants to file statements of defence be abridged.

[6] There is a further application that there be an order prohibiting publication of names.

[7] The first set of proceedings under EMPC 250/2018 was filed on 24 August 2018. I read the proceedings and the related applications and the extensive affidavit in support which was sworn and filed by a board member of the plaintiff Trust Board. I decided that there should be an order abridging time for the defendants to file a statement of defence to that first set of proceedings. The time that I set was to expire at 4pm on Friday 31 August 2018. No statement of defence was filed within that time.

[8] On the application for an order prohibiting publication, I decided that there should be such an order. I did not go into all the circumstances which justified the making of that order, because that would have been counter-productive in the sense that it would have been likely to have provided information which might have led to the parties being identified. No order was specifically sought for an order prohibiting publication of the names of the defendants but for the same reason I made an order prohibiting publication of their names as well because, again, I thought that by their being identified, that might be likely to lead to identification of the name of the plaintiff Trust Board.

[9] So that was the position as it stood on Friday 31 August 2018. Obviously, a copy of the proceedings had been served on the defendants, so that they knew of the proceedings. A copy of my minute granting urgency, abridging the time for filing of the statement of defence and prohibiting publication had been directed to be served on the defendants and I understand that was done. I also understand that it is likely that

since my minute containing the interim directions was served, the defendants, or at least the first defendant, has acted in breach.

[10] On 4 September 2018, the plaintiff filed an amended statement of claim in the proceedings EMPC 250/2018 and has also filed a second set of proceedings (EMPC 265/2018) based on the further determination of the Employment Relations Authority granting compliance orders against the defendant.

[11] Reverting to the earlier proceedings, in addition to making an interim order prohibiting publication of name, I set a hearing for today and made a strong recommendation to the defendants that they register an appearance. The purpose of today's hearing was to enable the defendants, if they wished, to make representations in respect of the proceedings as a whole but also in respect of the interim order prohibiting publication. I had directed that the defendants, if they wished to appear this morning, should also take steps in the proceedings. That was to be done by 4pm on 5 September 2018. No such steps have been taken.

[12] So, the position is that no statement of defence has been filed within the time ordered. No steps have been taken by

the defendants in respect of the interlocutory application seeking prohibition on publication, and the matter has been called in the Employment Court at Auckland this morning, 6 September 2018. Mr Hood and Mr Fraser have appeared before me as counsel acting for the plaintiff. The defendants have made no appearance. They have been specifically called in the corridors of the Court in case they were waiting there, but were not present when called.

[13] This matter is becoming serious because the evidence before me, accompanied by the pleadings and the other applications and memoranda, indicates that serious breaches of conditions of a mediated settlement are occurring and it has been necessary to take up the time of the Authority to obtain compliance orders.

[14] There is evidence, which I find is clearly established, that not only are disparaging comments being made by the defendants against the plaintiff in these proceedings, but quite serious contemptuous remarks have been put in the public domain about the Employment Relations Authority Member.

[15] Today Mr Hood, counsel for the plaintiff, seeks an order extending the interim order prohibiting publication until further order of the Court. He seeks urgency on the requirement of the defendants to file a statement of defence to the amended statement of claim which has been filed in proceedings EMPC 250/2018. He seeks urgency on the requirement to file a statement of defence to the new proceedings under EMPC 265/2018. He seeks an order that both sets of proceedings be heard together.

[16] Those orders will be made accordingly, so there will be an order extending the interim order prohibiting publication until further order of the Court. That is now to apply to both sets of proceedings filed in the Court. The defendants are to file a statement of defence to the amended statement of claim on or before 4pm on Friday 14 September 2018.

[17] There will be an order granting urgency in respect of the new proceedings filed under EMPC 265/2018, and the defendants are to file a statement of defence to those proceedings on or before 4pm on Friday 14 September 2018.

[18] There is an order that the proceedings be heard together.

[19] I wish to make some further comments which will be contained in this oral judgment. The first defendant in these proceedings, as I have already indicated, acts as an advocate and is, therefore, in respect of the matters before the Authority, the agent of the employee who commenced the proceedings in the Authority. The parties were then referred on to mediation and the proceedings were settled by a properly constituted settlement agreement endorsed by a Mediator in the Mediation Service and pursuant to the provisions of the Act.

[20] I am not sure whether the employee for whom the first defendant acted is aware of what has transpired since that settlement. It appears that she has received the fruits of the settlement agreement. She is bound by the non-disparagement provision in the settlement agreement and if the first defendant in these proceedings acts in breach, he also being specifically bound, then he may also lay his client open to applications for compliance, he acting on her behalf. That, in turn, may potentially expose her to orders in this Court imposing fines or even, although unlikely, imprisonment.

[21] The first defendant, as an advocate before this Court, is not a lawyer. He nevertheless should act in the same way as legal counsel would act. He must maintain some independence from his client in order to act effectively as her advocate and not to get emotionally involved in her cause. Otherwise he loses the ability to properly represent her interests in litigation. I am not sure, from what I have seen on this file, that he understands that.

[22] As I have indicated, by doing what he has done as her agent, he has potentially exposed his client to the risk of remedies against her. I am not sure that she as his client is aware of that. All I can say is that surely the first defendant would see the need to act as responsible counsel would act and not embark upon the crusade which he is clearly embarking on now. If he wishes to continue acting as advocate for the people that he says that he acts for, then he is now clearly stepping outside his proper role and should cease doing so. I make those comments in the hope that the behaviour I have seen on this file will come to an end and that perhaps the first defendant will consider removing from the social media pages the disparaging comments which he has made, not only about the plaintiff in this case, but other employers. He should also withdraw the disgraceful, contemptuous comments that he has either made or has allowed to remain on social media, about the Employment Relations Authority Member. I will say no more than that because in the proceedings before the Court, proper process must prevail. By the orders that I have made this morning, I have given the defendants now the opportunity to participate in the proceedings by filing pleadings within an abridged time.

[23] The matter is urgent. It must be resolved and cannot go on as it is. If the defendants choose not to participate in the proceedings, then the plaintiff will be entitled to apply for a hearing so that the matter may be dealt with by way of formal proof. That is a matter, however, which will be further considered once the time-limits that I have set this morning have expired.

[24] At the moment, it is appropriate that costs simply be reserved and I make an order reserving costs.

[25] Prohibition on publication will extend to the names of the defendants. I have been careful not to name any of the parties in this judgment; both sets of proceedings will remain under the RPW v H and C nomenclature.

[26] Finally, there will be an order granting leave to any of the parties to make any further application to the Court on notice.

M E Perkins Judge

Oral judgment delivered at 10.31 am on 6 September 2018

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