NOTE: EMPLOYMENT COURT ORDER PERMANENTLY PROHIBITING PUBLICATION OF THE NAMES OF THE PARTIES AND ANY IDENTIFYING PARTICULARS REMAINS IN FORCE.

NOTE: EMPLOYMENT COURT ORDER PROHIBITING ACCESS TO COURT FILE WITHOUT THE CONSENT OF A JUDGE REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA214/2016
[2016] NZCA 385

BETWEEN	B Applicant
AND	ALA Respondent

Hearing:	1 August 2016
Court:	Kós P, Cooper and Winkelmann JJ
Counsel:	W T Nabney for Applicant M P Ward-Johnson for Respondent
Judgment:	10 August 2016 at 11 am

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The applicant must pay the respondent costs for a standard application for leave on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Winkelmann J)

[1] The applicant, B, applies for leave under s 214(1) of the Employment Relations Act 2000 to appeal a decision of Judge Inglis in the Employment Court.[1] Rights of appeal under that section are limited to questions of law. The issue for us is whether the questions of law B seeks to pursue on appeal are of such general or public importance that they ought to be submitted to the Court of Appeal for decision.[2]

[2] B was employed by the respondent as an IT network specialist. Concerns arose during the course of his employment as to whether he was accessing a computer system and deleting data without authorisation. He was suspended on full pay pending an investigation. A concurrent police investigation was commenced, which led to him being charged with computer-based offences.

[3] The parties resolved the employment issues between them and recorded their settlement in an agreement. The settlement agreement included express reference to B's ongoing obligations of confidence and contained expanded undertakings of confidentiality in relation to matters arising from the employment investigation.

[4] Some time after the settlement of these issues, the criminal charges against B were withdrawn. At a later date still, B prepared a video in which he set out his explanation of events, and his perception of what had occurred and why. He made that video available via his website and sent emails to a large number of the respondent's staff and to staff of other organisations, inviting them to view the video.

[5] The respondent sought and obtained orders in the Employment Relations Authority that B comply with the various confidentiality undertakings in the agreement.[3] The Authority also imposed a penalty on B for breach of those obligations.[4]

[6] The Authority's decision was challenged by B in the Employment Court. Judge Inglis was satisfied the compliance orders were appropriately made and were

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1 *ITE v ALA* [2016] NZEmpC 42.
2 Employment Relations Act 2000, s 214(3).
3 *P v Q* [2015] NZERA Auckland 181 at [50].
4 At [59].

necessary to prevent any future breach and to bring home to B the seriousness of his obligations.[5]

[7] B seeks to pursue issues on appeal as follows:

(a) Could B be in breach of his confidentiality obligations when the information he disclosed was already publicly available?

(b) Could B's expression of an opinion be a breach of those obligations, especially in light of the right to freedom of expression preserved by s 14 of the New Zealand Bill of Rights Act 1990?

(c) Was B's publication of information in relation to the police charges and their withdrawal a breach of the settlement agreement?

Analysis

[8] B argues that where information is publicly available, there cannot as a matter of law be a breach of confidentiality obligations contained within a settlement agreement. It is argued here that some of the information was already publicly available at the time that the agreement was entered into, and some became publicly available as a consequence of the criminal charge.

[9] We do not consider that this raises a question capable of serious argument on the particular facts of this case because the Judge found as a matter of fact that the information in question was not publicly available.[6] She also said that in any event, B had conceded in cross-examination that various matters referred to in the video related to information that was not publicly available.[7]

[10] The second ground which B seeks to pursue on appeal is whether it was right for the Employment Court to find that expressions of opinion by him were nevertheless covered by his obligations under the settlement agreement.[8] He says

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5 *ITE v ALA*, above n 1, at [70]–[71].
6 At [46]–[47].
7 At [47].
8 At [51]–[52].

they cannot have been covered by the agreement if those were pre-existing opinions held by him before the dispute with the respondent. He also wishes to argue that the decision of the Employment Court represents an unreasonable fetter on his right of expression contained within s 14 of the New Zealand Bill of Rights Act.

[11] The Judge addressed these arguments in her judgment. She found as a fact that statements made during the video were directed at setting out his response to issues raised during the employment process.[9] The Judge found B had voluntarily restricted his ability to air his views about employment issues.[10] She also acknowledged and ensured that the compliance orders should be no broader than necessary to enforce the terms of that agreement.[11] She amended the orders made by the Authority to ensure that.[12] There is therefore no merit to this proposed ground of appeal.

[12] Finally, the applicant argues that Judge Inglis was wrong to find that he had breached the settlement agreement when he published information that he had been charged by the police with criminal charges involving the respondent, that those charges had subsequently been withdrawn, and that the prosecution had been a waste of time and money.

[13] We consider that this ground relies upon a mischaracterisation of the Judge's findings. The passage in the judgment relied upon is the following:[13]

> … Plainly the references to management failings, issues giving rise to the involvement of the Police and [B's] departure from the organisation were based squarely on the matters that had led to the employment investigation, were discussed during the course of it and related to his subsequent departure from the organisation.

This finding cannot be characterised as the applicant would have it.

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9 At [44].
10 At [51].
11 At [71].
12 At [72]–[75].
13 At [39].

Result

[14] Arguments without merit are not questions of general or public importance. The application for leave is declined.

[15] The applicant must pay the respondent costs for a standard application for leave on a band A basis and usual disbursements.

Solicitors:
Jackson Reeves, Tauranga for Applicant